No. 15-109

Title:	Jermaine Simmons, et al., Petitioners v. Walter J. Himmelreich
Docketed:	July 23, 2015
Linked with 14A1201	
Lower Ct:	United states Court of Appeals for the Sixth Circuit
Case Nos.:	(13-4212)
Decision Date:	September 9, 2014
Rehearing Denied:	March 10, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
May 22 2015	Application (14A1201) to extend the time to file a petition for a writ of certiorari from June 8, 2015 to July 23, 2015, submitted to Justice Kagan.
May 22 2015	Application (14A1201) granted by Justice Kagan extending the time to file until July 23, 2015.
Jul 23 2015	Petition for a writ of certiorari filed. (Response due August 24 2015)
Aug 4 2015	Order extending time to file response to petition to and including September 23, 2015.
Sep 22 2015	Brief of respondent Welter J. Himmelreich in opposition filed.
Sep 22 2015	Motion for leave to proceed in forma pauperis filed by respondent Walter J. Himmelreich.
Oct 7 2015	DISTRIBUTED for Conference of October 30, 2015.
Oct 8 2015	Reply of petitioners Jermaine Simmons, et al. filed. (Distributed)
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 6 2015	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 6 2015	Petition GRANTED.
Nov 23 2015	The time to file the joint appendix and petitioners brief on the merits is extended to and including December 28, 2015.
Nov 23 2015	The time to file respondent's brief on the merits is extended to and including February 3, 2016.
Dec 28 2015	Joint appendix filed. (Statement of cost filed.)
Dec 28 2015	Brief of petitioners Jermaine Simmons, et al. filed.
Jan 29 2016	SET FOR ARGUMENT ON Tuesday, March 22, 2016
Feb 3 2016	Brief of respondent Welter J. Himmelreich filed.
Feb 4 2016	Brief amici curiae of Professors Gregory Sisk and James Plander filed.
Feb 8 2016	Record requested from U.S.C.A. 6th Circuit.
Feb 10 2016	CIRCULATED.
Feb 10 2016	Brief amici curiae of Public Citizen, Inc., et al. filed. (Distributed)
Mar 4 2016	Reply of petitioners Jermaine Simmons, et al. filed. (Distributed)
Mar 22 2016	Argued. For petitioners: Roman Martinez, Assistant to the Solicitor General, Department

	of Justice, Washington, D. C. For respondent: Christian Vergonis, Washington, D. C.
Jun 6 2016	Judgment is affirmed and case remanded. Sotomayor, J., delivered the opinion for a unanimous Court.
Jul 8 2016	JUDGMENT ISSUED

15-109

No.

In the Supreme Court of the United States

JERMAINE SIMMONS AND BRIAN BUTTS, PETITIONERS

v.

WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented here is the same question on which this Court granted certiorari (but did not resolve) in *Will* v. *Hallock*, 546 U.S. 345 (2006):

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners are Jermaine Simmons and Brian Butts.[1]

Respondent is Walter J. Himmelreich.

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[1] The motion for summary judgment that gave rise to the district court and court of appeals' decisions at issue in this petition erroneously identified Amanda Newland and Janet Bunts as movants. See D. Ct. Doc. 45, at 1 (Apr. 26, 2013). In fact, the district court had already dismissed the Eighth Amendment *Bivens* claims against those defendants, and the court of appeals had affirmed those dismissals. See App., *infra*, 40-44a (dismissing Eighth Amendment claim against Bunts and Newlands); *id.* at 30a-32a & n.1 (affirming dismissal of those claims). Defendant Janel Fitzgerald remains a party to this case in the district court, but she is not a party to the Eighth Amendment claim that is the subject of this petition. *Id.* at 27a-29a (analyzing allegations against Fitzgerald as part of respondent's First Amendment claim).

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In the Supreme Court of the United States

No.

JERMAINE SIMMONS AND BRIAN BUTTS, PETITIONERS

v.

WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal-officer petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 766 F.3d 576. The order of the court of appeals denying rehearing en banc (App., *infra*, 11a-12a) is unreported. The opinion of the district court (App., *infra*, 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2014 (App., *infra*, 1a-10a). A petition for rehearing en banc was denied on March 10, 2015 (App., *infra*, 11a-12a). On May 22, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 23, 2015.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in an appendix to this petition. App., *infra*, 64a-72a.

STATEMENT

The question in this case is whether the FTCA judgment bar, 28 U.S.C. 2676, applies to an FTCA judgment based on one of the exceptions to FTCA liability set forth in 28 U.S.C. 2680. That is the same question on which this Court granted certiorari in *Will* v. *Hallock*, 546 U.S. 345 (2006). The Court did not resolve that question in *Will* because it concluded that the Second Circuit had lacked jurisdiction to hear the appeal. *Id.* at 349.

Here, the district court applied the FTCA judgment bar and granted petitioners' motion to dismiss respondent's Eighth Amendment claim brought pursuant to *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 20a-22a. The court of appeals reversed. *Id.* at 1a-10a. Just like the Second Circuit in *Will*, the Sixth Circuit here concluded that the term "judgment" in the FTCA judgment bar does not encompass FTCA judgments based on Section 2680. *Id.* at 7a-8a; *Hallock* v. *Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), vacated on other grounds *sub nom. Will* v. *Hallock*, *supra*.

1. The FTCA judgment bar provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Thus, by its plain terms, the judgment bar protects a federal employee from suit where the claimant has brought an action against the United States under the FTCA, that action has gone to judgment, and the suit against the employee concerns the same subject matter. *Ibid.*

Section 1346(b) is the jurisdictional provision of the FTCA. It grants the district courts "exclusive jurisdiction" over tort claims against the United States. Specifically, Section 1346(b) provides that

> Subject to the provisions of chapter 171 of this title, [the district courts] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

Chapter 171 of Title 28 contains various procedural and liability provisions of the FTCA. See 28 U.S.C. 2671-2680. Section 2680 of Chapter 171 enumerates several exceptions to the FTCA, including for any claim based upon a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a). Section 2680 itself states that Section 1346(b) "shall not apply" to the categories of claims set forth in its list of exceptions, and this Court and the courts of appeals have generally recognized that Section 2680's

exceptions to FTCA liability constitute "jurisdictional" limits on the power of courts to adjudicate FTCA claims.[2]

2. Respondent is currently a federal inmate at the Federal Correctional Institution (FCI) in Danbury, Connecticut. He is serving a 240-month sentence for production of child pornography, in violation of 18 U.S.C. 2251(b). Pet. C.A. Br. 2. Respondent asserts that in October 2008, while serving his sentence at the FCI in Elkton, Ohio, he was assaulted by another inmate at the prison. *Id.* at 2-3. According to respondent, petitioners—both of whom are staff members at FCI Elkton—were on notice that the other inmate intended to attack him, and yet placed him in the general prison population where he would be exposed to the attack. *Ibid.*; App., *infra*, 2a, 14a.

a. In February 2010, respondent filed an FTCA action in federal district court against the United States. Pet. C.A. Br. 3. In October 2010, he filed this case as a separate action against petitioners (along with various other defendants who are not a party to this petition) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Among other claims, respondent alleged that petitioners' actions in connection with the assault on respond-

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[2] See, *e.g.*, *Dalehite* v. *United States*, 346 U.S. 15, 24, 31 n.25 (1953); *Domme* v. *United States*, 61 F.3d 787, 789 (10th Cir. 1995); *Richardson* v. *United States*, 943 F.2d 1107, 1113 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Sowell* v. *United States*, 835 F.2d 1133, 1135 (5th Cir. 1988); *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822, 823 (2d Cir. 1985); but see *Williams* v. *Fleming*, 597 F.3d 820, 823-824 (7th Cir. 2010); see generally 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 7.01[2] (2014).

ent by another inmate violated the Eighth Amendment. Pet. C.A. Br. 5-6.

In November 2010, the district court dismissed respondent's FTCA action pursuant to the FTCA's discretionary-function exception, 28 U.S.C. 2680(a). App., *infra*, 47a-54a. The court explained that decisions by prison officials regarding inmate safety generally involve the exercise of judgment. *Id.* at 49a-50a. It noted that respondent had not alleged that petitioners were aware of any specific threats directed at him, and it emphasized that petitioners made a "policy decision" to house respondent in the general population based on the absence of any specific threat against him. *Id.* at 52a-53a. The court also explained that Section 2680(a) is an exception to the FTCA's general waiver of sovereign immunity from tort claims against the United States, and that the court therefore "lacks subject matter jurisdiction over acts falling within the discretionary function exception." *Id.* at 49a. On November 18, 2010, the district court formally issued a document entitled "Judgment Entry" that declared that it was "ORDERED, ADJUDGED, and DECREED" that the case was dismissed. *Id.* at 55a-56a.[3]

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[3] Several days later, respondent filed a motion asking the district court to alter or amend the judgment and to reconsider the dismissal of his FTCA claim. See 10-cv-00307 Docket entry (Dkt.) No. 37 (Nov. 30, 2010). The court denied the motion, and respondent's subsequent appeal was eventually dismissed by the court of appeals for failure to prosecute. Dkt. No. 38 (Dec. 2, 2010); App., *infra*, 57a-58a. In July 2012, respondent filed a motion asking the district court to recall the judgment. Dkt. No. 45 (July 26, 2012). The district court denied that motion, and the court of appeals affirmed. App., *infra*, 59a-60a.

b. In March 2011, the district court in respondent's separate *Bivens* action dismissed that action under 28 U.S.C. 1915(e) for failure to state a claim. App., *infra*, 34a-46a. In May 2012, the court of appeals remanded the *Bivens* Eighth Amendment claim alleging that the individual defendants had failed to protect respondent from the inmate-on-inmate assault. *Id.* at 30a-31a.[4]

On remand, the district court granted the government's motion for summary judgment on the Eighth Amendment claim on two alternative grounds: (1) respondent's failure to exhaust his administrative remedies, and (2) Section 2676's judgment bar. App., *infra*, 18a-22a. As to the latter, the court explained that the judgment bar "applies to all judgments" in FTCA actions, including those obtained "because the actions in controversy f[all] under the discretionary exception to the FTCA [28 U.S.C. 2680(a)]." App., *infra*, 21a (citing *Harris* v. *United States*, 422 F.3d 322, 336 (6th Cir. 2005)). The court noted that respondent's Eighth Amendment claim "arises out of the very same occurrence [as the prior FTCA suit]; the assault in 2008, and the same actions; the alleged prison's failure to protect." App., *infra*, 21a.

c. The court of appeals reversed in relevant part. App., *infra*, 1a-10a. The court first excused respondent's failure to exhaust administrative remedies based

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[4] The court of appeals also remanded a *Bivens* claim that respondent brought under the First Amendment. App., *infra*, 27a-29a. Respondent's First Amendment claim remains pending in the district court, and it is not at issue in this petition for certiorari. See *id.* at 17a-18a (subsequent district court opinion dismissing First Amendment claim for failure to exhaust administrative remedies); see also *id.* at 2a-5a (reversing dismissal of First Amendment claim and remanding to district court).

on his allegation—which the court assumed to be true—that prison officials had threatened him with retaliation if he pursued the prison grievance process. *Id.* at 3a-5a. That aspect of the court's ruling is not at issue here.

The court of appeals then held that the FTCA judgment bar did not bar respondent's Eighth Amendment claim. App., *infra*, 6a-10a. The court explained that the district court's dismissal of respondent's FTCA claim under Section 2680(a) was a dismissal for lack of subject-matter jurisdiction. *Id.* at 6a. The court held that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the [Section] 2676 judgment bar," reasoning that, "in the absence of jurisdiction, the court lacks the power to enter judgment." *Ibid.* (citing 10A Charles Alan Wright et al., *Federal Practice and Procedure* § [2]713 (3d ed. 1998) (*Federal Practice & Procedure*)). The court also invoked the "general rule" that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." *Id.* at 9a.

The court of appeals went on to distinguish its prior decision in *Harris*, rejecting the notion that *Harris* had held "that any disposition of an FTCA action prevents other suits." App., *infra*, 7a. The court noted that *Harris* had cited the Second Circuit's decision in *Hallock*, 387 F.3d at 155, which had held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA [in 28 U.S.C. 2680]" does not qualify as a "judgment" for purposes of the judgment bar. App., *infra*, 7a-8a.

The court of appeals also distinguished its treatment of FTCA dismissals under Section 2680(a) from the approach taken by the Seventh Circuit. App., *infra*, 8a-9a (discussing *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008), cert. denied, 558 U.S. 1011 (2009)). The court acknowledged that the Seventh Circuit holds that a dismissal under Section 2680(a) triggers the FTCA judgment bar. *Ibid.* The court explained, however, that the Seventh Circuit treats a Section 2680(a) dismissal as "a decision on the merits," not as a dismissal for lack of jurisdiction. *Ibid.* The court noted that the Seventh Circuit had not yet addressed whether "any dismissal, whether or not on the merits, suffices for application of [the judgment bar]." *Id.* at 9a (quoting *Williams* v. *Fleming*, 597 F.3d 820, 822 n.2 (7th Cir. 2010)).

d. The court of appeals subsequently denied petitioners' petition for rehearing en banc. App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

This case is worthy of further review for the same reasons that this Court granted certiorari in *Will* v. *Hallock*, 546 U.S. 345 (2006). The FTCA judgment bar, 28 U.S.C. 2676, establishes a "complete bar" to "any action" against government employees in connection with acts that have been the subject of "an action under section 1346(b)" of the FTCA that has gone to "judgment." *Ibid.* The court of appeals' decision rendered the judgment bar inapplicable even though it is undisputed that respondent brought a prior suit pursuant to Section 1346(b) concerning the same subject matter and that, as a result of Section 2680, the district court dismissed respondent's suit and entered a final judgment. Just like the Second Circuit's ruling

in *Hallock*, the court's decision in this case is contrary to the plain language of Section 2676 and exacerbates a direct conflict among the courts of appeals on an important and recurring issue. Review by this Court is warranted.

I. THE COURT OF APPEALS MISCONSTRUED THE JUDGMENT BAR

The FTCA judgment bar unambiguously prohibits respondent from bringing his Eighth Amendment *Bivens* claim against petitioners. In concluding otherwise, the court of appeals repeated the error that the Second Circuit committed in *Hallock*. Certiorari is warranted to correct that error and to enforce the plain meaning of the statutory text enacted by Congress.

A. The FTCA Judgment Bar Is Triggered By Any Judgment Dismissing An FTCA Action Under Section 2680

The text of the FTCA judgment bar is simple and direct, and there is no question that the express elements for its application are satisfied in this case. The statute provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Respondent's prior FTCA suit was indisputably "an action under section 1346(b)." *Ibid.* The sole basis asserted for the court's jurisdiction in respondent's suit against the United States was the FTCA. See Dkt. No. 33, at 2 (Nov. 10, 2010) (respondent's statement that "this suit was filed under the [FTCA], 28 U.S.C. §§ 2671, et seq."). It is also clear that the present action arises out of "the

same subject matter" as the FTCA suit, and that "judgment" was entered in the earlier litigation. See App., *infra*, 55a-56a ("Judgment Entry"); *id.* at 21a-22a.

Under the plain text of the judgment bar, it makes no difference that respondent lost his FTCA suit. As the Sixth Circuit itself has recognized, see *Harris* v. *United States*, 422 F.3d 322, 334-335 (2005), and as the other courts of appeals that have considered the question have also concluded, a judgment under the FTCA triggers the judgment bar in a subsequent suit against federal employees on the same subject matter even when the FTCA judgment is adverse to the claimant. See, *e.g.*, *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858 (10th Cir. 2005); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). Section 2676 is a "judgment bar," not a "favorable judgment bar." As the Tenth Circuit has explained, "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001).

Nor does the plain text of the judgment bar render the bar inapplicable where judgment is entered because the claim falls within one of the FTCA's exceptions in Section 2680. The exceptions in Section 2680 limit *both* the jurisdiction of courts over FTCA actions, 28 U.S.C. 1346(b)(1), *and* the substantive liability of the United States, 28 U.S.C. 2674. It does not matter whether the Section 2680 exception was found to apply on a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), on a

motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6), on summary judgment under Rule 56, or after a trial. No matter what procedural device triggered the Section 2680 judgment, the judgment bar applies. The district court was therefore right to grant summary judgment to petitioners on respondent's Eighth Amendment claim pursuant to the judgment bar. App., *infra*, 21a-22a.

B. The Court Of Appeals Erred By Reading An Implicit Limitation Into The Unambiguous Text Of Section 2676

Despite the plain language of Section 2676, the court of appeals carved out an exception to the judgment bar where the prior FTCA action is "dismiss[ed] for lack of subject-matter jurisdiction." App., *infra*, 6a. The court explained that because the district court in the FTCA action lacked subject matter jurisdiction, it "lack[ed] the power to enter judgment" and thus that its dismissal of that action does not trigger the judgment bar. *Ibid.* (quoting *Federal Practice & Procedure* § 2713). The court's reasoning and conclusion are both flawed.

1. If taken literally, the court of appeals' statement that the district court that dismissed respondent's FTCA claim on Section 2680 grounds "lacked the power to enter judgment" is not correct. It is, of course, well settled that "[a] federal court always has jurisdiction to determine its own jurisdiction." *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). When a federal court determines that its own jurisdiction is lacking, the proper recourse is to enter a judgment of

dismissal on that ground.[5] The dismissal of respondent's FTCA claim, though jurisdictional, was plainly a properly entered "judgment."[6]

More likely, the court of appeals concluded that the judgment bar applies only to a *subset* of judgments—those issued "on the merits." That too is incorrect. The text of the judgment bar does not limit its scope to judgments entered "on the merits." As this Court has explained, statutory construction "begins with the language of the statute," and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted). The court of appeals lacked authority to limit the scope of the judgment bar to cover only a subset of judgments.[7]

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[5] See, *e.g.*, *Great W. Ins. Co.* v. *United States*, 112 U.S. 193, 196 (1884) (explaining that when a court "is forbidden to entertain jurisdiction," then a "judgment of dismissal" is appropriate); cf. *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 291 (1947) (referring to this Court's "judgment declining jurisdiction" over appeal) (citation omitted); Fed. R. Civ. P. 54(a) (defining "judgment" for purposes of federal rules to include "any order from which an appeal lies").

[6] The only authority that the court of appeals cited for its statement that a court "lacks the power to enter judgment" when it has no subject-matter jurisdiction was *Federal Practice and Procedure* § 2713. But that treatise merely indicates that when a court lacks subject-matter jurisdiction, "it has no power to issue a judgment *on the merits*." *Federal Practice & Procedure* § 2713, at 239 (emphasis added). It does not say that the court lacks power to issue any judgment at all.

[7] As discussed further below, the Ninth Circuit has held that the judgment bar does not apply to FTCA judgments dismissing a case due to a curable procedural defect (such as a failure to exhaust administrative remedies), so long as the case involves a

Moreover, even if the court of appeals was right to hold that the judgment bar applies only to FTCA judgments "on the merits," it was wrong to conclude that the dismissal of an FTCA case based on the Section 2680 exceptions is not "on the merits." Those exceptions limit the United States' waiver of its sovereign immunity and, in that sense, they constrain the courts' exercise of jurisdiction. But the text and structure of the FTCA make clear that they are not merely jurisdictional.

The Section 2680 exceptions function both as jurisdictional limitations on the United States' waiver of its sovereign immunity and as substantive restrictions on the United States' liability under Section 2674. See 28 U.S.C. 2680 (stating that neither "[t]he provisions of [Chapter 171]" *nor* of "Section 1346(b)" shall apply to the identified categories of claims). Section 1346(b)(1) waives the sovereign immunity of the United States for tort claims and grants the district courts jurisdiction over such claims, but it does so "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.* The provisions of "chapter 171"—including Section 2674 ("Liability of United States") and Section 2680 ("Exceptions")—in turn create and define the scope of the United States' substantive tort liability. Those

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"claim[] for harms that Congress has agreed, in principle, [is] cognizable." *Pesnell* v. *Arsenault*, 543 F.3d 1038, 1046 (2008) (Clifton, J., concurring); *id.* at 1042 (endorsing Judge Clifton's analysis); see p. 22, *infra*. Even on that view, however, the judgment bar applies to any FTCA judgment of dismissal based on the exceptions to liability in Section 2680. *Pesnell*, 543 F.3d at 1046 (applying judgment bar to dismissal under Section 2680(h)). The Ninth Circuit's interpretation of the judgment bar provides an alternative basis for answering the question presented and concluding that the bar applies to any FTCA judgment of dismissal under Section 2680.

provisions are referred to elsewhere in the FTCA as "the limitations and exceptions applicable" to "any action * * * pursuant to section 1346(b)." 28 U.S.C. 2679(d)(4). Because they are incorporated by reference into Section 1346(b)(1), they are also conditions on the waiver of sovereign immunity and limitations on the jurisdiction of the district court. But that does not deprive them of their separate substantive character as well.

This Court's own description of the Section 2680 exceptions correctly recognizes that they set forth limitations on the United States' substantive FTCA liability. In *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013), for example, the Court stated that, "[s]ubstantively, the FTCA makes the United States liable" to the same extent as private individuals under state law, "subject to enumerated exceptions to the immunity waiver, §§ 2680(a)-(n)." The Court likewise described the Section 2680 exceptions as limitations on "[t]he liability of the United States" in *United States* v. *Gaubert*, 499 U.S. 315 (1991), further noting that Section 2680(a) provides that "the Government is not liable for" a claim based on the performance of a discretionary function. *Id.* at 322; see *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992) (referring to the "various statutory exceptions to FTCA liability contained in § 2680"); *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984) (noting that Section 2680 exceptions were designed to mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect cer-

tain governmental activities from exposure to suit by private individuals").[8]

Moreover, the Court has recognized the inherently substantive nature of limitations of this sort, even when they are phrased in jurisdictional terms. As the Court explained in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply," "the limitation is essentially substantive." *Id.* at 695 n.15 (citing *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). That description is particularly appropriate with respect to the limitations on the United States' liability expressed in Section 2680. Although they are jurisdictional by virtue of their incorporation into 28 U.S.C. 1346(b), they also "prescribe[] a limitation that any court entertaining the cause of action [is] bound to apply." *Altmann*, 541 U.S. at 695 n.15.

Finally, the substantive character of the FTCA's exceptions in Section 2680 is confirmed by the exten-

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[8] The principal draftsman of Section 2680 likewise described the exceptions provided there as "exceptions to liability." See Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 15-16 (1931) ("In order to protect the taxpayers in this connection, * * * it is proposed to safeguard the United States by enumerating certain exceptions to liability. * * * The following is a list of the proposed exceptions to liability: [continues to list and describe exceptions, including what ultimately became Section 2680(c)]."). Although "the [Holtzoff] report was never introduced into the public record," and therefore should not be given "great weight," the Court has recognized that, "in the absence of any direct evidence regarding how members of Congress understood" the Section 2680 exceptions, it is "senseless to ignore entirely the views of its draftsman." *Kosak* v. *United States*, 465 U.S. 848, 857 n.13 (1984).

sive litigation that may be required in order to determine their application—litigation that is, in many cases, not meaningfully different from that required in other, unquestionably merits-related, contexts. In many cases, litigation of the government's assertion of a Section 2680 exception consumes considerable time and energy on the part of the government and judiciary. Frequently, the applicability of one of the exceptions is not resolved until "after extensive discovery and a trial." *Begay* v. *United States*, 768 F.2d 1059, 1060 (9th Cir. 1985); see, *e.g.*, *Aragon* v. *United States*, 146 F.3d 819, 821 (10th Cir. 1998) ("After a four-day bench trial focusing on the discretionary function exception, the district court dismissed the case for lack of subject matter jurisdiction."). The Tenth Circuit has, in fact, adopted a general rule that, because "[t]he determination of whether the FTCA excepts the government's actions from its waiver of sovereign immunity involves both jurisdictional and merits issues," the question should be decided on summary judgment under Federal Rule of Civil Procedure 56. *Bell* v. *United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (citation omitted). In other cases, the government's invocation of an exception in Section 2680 is ultimately vindicated only on appeal, after the case has already been litigated to judgment following a trial.[9]

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[9] See, *e.g.*, *Varig Airlines*, 467 U.S. at 803-804, 821; *Kelly* v. *United States*, 241 F.3d 755, 757 (9th Cir. 2001) (on appeal from judgment after trial, holding that action was barred by discretionary function exception and remanding "to dismiss * * * for lack of subject matter jurisdiction"); *Andrews* v. *United States*, 121 F.3d 1430, 1435 (11th Cir. 1997) (same).

It is thus not uncommon for the United States to invest considerable resources (with attendant distractions to the government employee whose conduct is at issue) in defending an FTCA suit on the basis of a Section 2680 exception. It would be contrary to both the text and the policies underlying the FTCA's judgment bar to permit the plaintiff then to "turn around and sue" the individual employee, thereby imposing "a very substantial burden" to defend against the suit a second time. *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting testimony of Assistant Attorney General Shea). In every relevant sense, the dismissal of an FTCA case under the Section 2680 exceptions qualifies as a dismissal "on the merits."

2. The court of appeals also invoked the "general rule" that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." App., *infra*, 9a. That "general rule" reflects common-law principles of res judicata, but it has no direct application here. The statutory provision drafted by Congress makes application of the judgment bar turn on whether an FTCA case involving the same subject matter has previously been litigated to a judgment—not on whether or when a particular FTCA judgment would have preclusive effect under the common law.[10]

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[10] In *Will*, this Court recognized an analogy between the judgment bar and res judicata when considering the question (not at issue here) of whether to apply the collateral order doctrine to a district court's decision not to apply the judgment bar. 546 U.S. at 354. In doing so, however, the Court noted that "the statutory judgment bar is arguably broader than traditional res judicata." *Ibid.*

Even if the court of appeals was correct that the judgment bar should be interpreted through the prism of res judicata doctrine, however, a Section 2680 dismissal would *still* qualify as a judgment triggering the bar. That is because dismissals on grounds of sovereign immunity are properly regarded as judgments "on the merits" for purposes of res judicata when—as here—the immunity reflects a substantive limitation on the government's liability.

It has often been noted that the "on the merits"/"lack of jurisdiction" dichotomy in traditional res judicata doctrine is unhelpful because of the lack of clarity in the two terms. The "word 'jurisdiction' * * * can play different roles in different legal contexts," *Rose* v. *Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986); accord *Kontrick* v. *Ryan*, 540 U.S. 443, 454-455 (2004), and the Second Restatement has abandoned the phrase "on the merits" in the text of the general rule "because of its possibly misleading connotations." Restatement (Second) of Judgments § 19 cmt. a (1982). "The Restatement means the word ['jurisdiction'] to refer to typical 'jurisdictional' dismissals—where, for example, a plaintiff sues in the wrong court. * * * They rest upon * * * defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again." *Rose*, 778 F.2d at 79-80; see *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (referring to the jurisdiction exception to res judicata as the "'curable defect' exception," which applies where a precondition that was absent in the first suit can be and is remedied before the second).

On the other hand, as this Court has recognized, the phrase "on the merits" encompasses a ruling that, even though perhaps "declining to reach [the] ultimate substantive issues," is "based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation." *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947); see *ibid.* ("It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation.").

Here, the court of appeals noted the general rule that dismissals for lack of subject matter jurisdiction are not entitled to res judicata effect, but it did not cite any cases actually applying that rule in the context of a dismissal on sovereign immunity grounds. In fact, numerous judicial decisions establish that a dismissal on sovereign immunity grounds operates as a dismissal "on the merits" when the immunity reflects a substantive limitation on the government's liability (as it does here, see pp. 13-17, *supra*).[11] As the Ninth

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[11] See, *e.g.*, *Flores* v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984) ("A summary judgment on grounds of sovereign immunity is," under Texas law, "a judgment on the merits for purposes of res judicata."); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984) ("In Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion."); *Bloomquist* v. *Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995) ("A dismissal based on sovereign immunity is a decision on the merits, as it determines that a party has no cause of action or substantive right to recover against the United States."); *Beaver* v. *Bridwell*, 598 F. Supp. 90, 93 (D. Md. 1984); *Mills* v. *Lincoln Cnty.*, 864 P.2d 1265, 1266-1267

Circuit explained in an FTCA case, whereas, "[o]rdinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court," if, because of the discretionary function exception, "the bar of sovereign immunity is absolute [and] no other court has the power to hear the case," the case is properly dismissed "with prejudice." *Frigard* v. *United States*, 862 F.2d 201, 204 (1988) (citation omitted), cert. denied, 490 U.S. 1098 (1989); see *Midwest Knitting Mills, Inc.* v. *United States*, 741 F Supp. 1345, 1352 (E.D. Wis. 1990) (same), aff'd, 950 F.2d 1295 (1991).[12]

In this case, the dismissal of respondent's FTCA action on the basis of Section 2680(a) did not reflect merely "the distribution of judicial power among the various courts." *Angel*, 330 U.S. at 190. Rather, it effectuated an affirmative congressional determination to impose a substantive limit on "[t]he liability of

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(Mont. 1993); *Annapolis Urban Renewal Auth.* v. *Interlink, Inc.*, 405 A.2d 313, 317 (Md. Ct. Spec. App. 1979); *Herring* v. *Texas Dep't of Corr.*, 500 S.W.2d 718, 720 (Tex. Civ. App. 1973), aff'd, 513 S.W.2d 6 (Tex. 1974).

[12] Two other courts of appeals have, in dictum in the context of deciding which Federal Rule of Civil Procedure should govern a Section 2680 dismissal, expressed a view on whether an FTCA judgment in the government's favor on the basis of a Section 2680 exception would have res judicata effect. See *Williams* v. *United States*, 50 F.3d 299, 304-305 (4th Cir. 1995) (dismissal on Section 2680 grounds should be under Rule 12(b)(1) because "dismissal for jurisdictional defects has no *res judicata* effect"); *Wheeler* v. *Hurdman*, 825 F.2d 257, 259 & n.5 (10th Cir.) (FTCA exceptions should be decided under Rule 56, rather than Rule 12(b)(1), because it would then have claim preclusive effect), cert. denied, 484 U.S. 986 (1987). Neither decision, however, contains any sustained analysis of the issue.

the United States under the FTCA." *Gaubert*, 499 U.S. at 322; see pp. 13-17, *supra*. Where, as here, the basis of the dismissal, even if phrased in jurisdictional terms of sovereign immunity, reflects "a significant substantive policy" determination that, "as a substantive matter, the plaintiff cannot maintain his cause of action," the dismissal is "a judgment on the merits" with claim preclusive effect. *Annapolis Urban Renewal*, 405 A.2d at 318-319 (quoting *Weston Funding Corp.* v. *Lafayette Towers, Inc.*, 550 F.2d 710, 714 (2d Cir. 1977). Thus even if it were appropriate to limit the scope of the judgment bar by reference to common law principles, the bar would still apply to FTCA judgments obtained under Section 2680.

II. THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT

A. The Court Of Appeals' Decision Squarely Conflicts With Decisions Of The Seventh And Ninth Circuits

Like the analogous Second Circuit decision in *Hallock* v. *Bonner*, 387 F.3d 147 (2d Cir. 2004), vacated on other grounds *sub nom. Will* v. *Hallock*, *supra*, the decision of the Sixth Circuit directly conflicts with the decisions of two other circuits that have considered the precise question presented here. See Pet., *Will*, *supra* (No. 04-1332), at 14-15 (describing circuit conflict). In *Will*, this Court granted certiorari to address this circuit conflict, but the Court ultimately held that the court of appeals in that case lacked jurisdiction over the interlocutory appeal, and it did not resolve the conflict. 546 U.S. at 349. The present case does not suffer from a comparable procedural impediment. It is therefore an appropriate vehicle in which to address the split of authority.

The Seventh and Ninth Circuits have each held that the judgment bar applies where the prior FTCA judgment was based on a determination that the United States was not liable due to one of the FTCA exceptions set forth in 28 U.S.C. 2680. In *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008) the Ninth Circuit applied the judgment bar to foreclose a subsequent *Bivens* claim when the FTCA action was dismissed under 28 U.S.C. 2680(h), which exempts the United States from liability for claims alleging misrepresentation. 543 F.3d at 1046 (Clifton, J., concurring). The court held that the judgment bar covers FTCA judgments—such as those based on the Section 2680 exceptions—that reflect a decision by Congress to "explicitly carve[] out an exception to its waiver of sovereign immunity," and thus to "flatly reject[] liability" for a category of claims. *Ibid.*; see *id.* at 1042 (opinion for court endorsing Judge Clifton's analysis).[13] That holding is consistent with the Ninth Circuit's prior holding in *Gasho*, 39 F.3d at 1436-1438, where the court concluded that Section 2676's unconditional language applies to "*any* FTCA judgment," including a judgment based on the detention-of-goods exception to FTCA liability set forth in 28 U.S.C. 2680(c). 39 F.3d at 1437; see *id.* at 1433-1434, 1436-1438.

The Seventh Circuit also applies the judgment bar to FTCA dismissals based on the Section 2680 excep-

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[13] The *Pesnell* court distinguished such FTCA judgments from those based on curable procedural defects, which reflect Congress's decision to "accept[] possible liability [under the FTCA]," but to "channel[] the claims in a specific way." 543 F.3d at 1046 (Clifton J., concurring) (noting that an FTCA judgment based on a claimant's failure to exhaust administrative remedies does not trigger the judgment bar); see note 7, *supra* (discussing *Pesnell*).

tions. See, *e.g.*, *Williams* v. *Fleming*, 597 F.3d 820, 823-824 (2010) (applying judgment bar to dismissal under Section 2680(h)); *Hoosier Bancorp*, 90 F.3d at 184 (applying judgment bar to dismissal under Section 2680(a)). As noted above, that court—alone among the courts of appeals—takes the view that the Section 2680 exceptions to liability do not operate as jurisdictional constraints on the authority of district courts over FTCA cases. See *Williams*, 597 F.3d at 824; *Collins* v. *United States*, 564 F.3d 833, 837-838 (7th Cir. 2009). In the Seventh Circuit's view, the fact that a Section 2680 dismissal is not jurisdictional means that it is "on the merits"—and thus that it triggers the FTCA judgment bar. *Williams*, 597 F.3d at 824.

The court of appeals in this case noted that *Williams* had "expressly punted" on the question of whether "dismissal of an FTCA claim for a lack of subject-matter jurisdiction qualified as a judgment under [Section] 2676." App., *infra*, 8a-9a (citing *Williams*, 597 F.3d at 822 n.2). But *Williams* did *not* "punt" on the question presented in this petition, namely, whether the dismissal of an FTCA case under the Section 2680 exceptions triggers the judgment bar. On the contrary, the Seventh Circuit expressly held that because such a dismissal is "on the merits," the judgment bar therefore forecloses any subsequent *Bivens* action. 597 F.3d at 824.

In short, there is no question that if this case had arisen in either the Seventh or Ninth Circuits, respondent's Eighth Amendment *Bivens* claim would have been dismissed pursuant to the judgment bar. This Court's intervention is warranted to resolve the

clear conflict of authority among the courts of appeals.[14]

B. The Petition Presents A Recurring Question Of Considerable Importance Regarding The Personal Liability Of Federal Employees For Acts Taken In The Course Of Their Employment

This Court's review is warranted to resolve the conflict between the Sixth Circuit's decision and the decisions of the other courts of appeals identified above, and because the court of appeals' decision will otherwise undermine the purposes the judgment bar was intended to serve. The judgment bar reflects Congress's recognition that successive litigation of related claims imposes considerable burdens on the government, as well as on federal employees subject to suit for acts taken within the scope of their employment. See *Gasho*, 39 F.3d at 1437 ("Congress * * * was concerned about the [g]overnment's ability to marshal the manpower and finances to defend subsequent suits against its employees."). The decision of the court of appeals significantly reduces the effec-

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[14] The district courts are also divided over the proper application of the judgment bar to FTCA judgments of dismissal under Section 2680. Some of those courts—like the Second Circuit in *Hallock*, and the Sixth Circuit in this case—have refused to apply the judgment bar to judgments based on Section 2680. See, *e.g.*, *Addison* v. *Arnett*, No. CV213-71, 2015 WL 1259263, at *1 (S.D. Ga. Mar. 18, 2015) (relying on Second Circuit's decision in *Hallock*); *Pellegrino* v. *United States Transp. Sec. Admin.*, No. 09-5505, 2014 WL 1489939, at *8-*9 (E.D. Pa. Apr. 16, 2014) (same). Others have made clear that the judgment bar does apply in such circumstances. See, *e.g.*, *Gibson* v. *FBI*, No. 11-CV-00936, 2014 WL 4926184, at *8 (N.D. Ala. Sept. 30, 2014) (following *Pesnell* and *Williams*, rejecting *Hallock*, and applying judgment bar to FTCA judgment of dismissal under Section 2680).

tiveness of the judgment bar. Because so many of the Government's defenses under the FTCA may be characterized as "jurisdictional," the decision would deprive a very large number of FTCA judgments of their preclusive effect.

Indeed, even cases that have consumed considerable governmental resources, such as cases that have gone to summary judgment or trial on defenses such as the discretionary function exception, might, under a rule based upon a jurisdictional/non-jurisdictional distinction, be considered a "nullity" for purposes of the judgment bar. The only alternative would be to have the application of the judgment bar turn solely on the stage of the proceedings or the caption of the dispositive motion. None of those rules can be reconciled with either the text or the purposes of Section 2676. This Court should grant review to correct the court of appeals' erroneous limitation of this important federal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-4212

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

J. FITZGERALD, ET AL., DEFENDANTS-APPELLEES

Decided and Filed: Sept. 9, 2014

OPINION

Appeal from the United States District Court for the Northern District of Ohio at Youngstown
No. 4:10-cv-02404—John R. Adams, District Judge

Before: COLE, Chief Judge; MOORE and GIBBONS, Circuit Judges

PER CURIAM. In 2010, Walter J. Himmelreich—a federal prisoner—filed a complaint against numerous defendants, alleging several causes of action. The district court dismissed the complaint for failure to state a claim. On appeal, in Case No. 11-3474, we affirmed the dismissal of the majority of the claims and defendants, but

we vacated and remanded two claims for further proceedings: a claim of retaliation in violation of the First Amendment based on Himmelreich's placement in administrative detention for sixty days in 2009, allegedly in retaliation for his filing of a claim under the Federal Tort Claims Act ("FTCA"); and a claim of failure to protect in violation of the Eighth Amendment based on an assault on Himmelreich by another inmate in 2008. On remand, the remaining defendants moved for summary judgment, arguing that Himmelreich had failed to exhaust his administrative remedies on the two claims at issue and that his Eighth Amendment claim was barred because he had elected to file a claim under the FTCA regarding the assault incident. The district court found the defendants' arguments to be valid and granted their motion for summary judgment. Himmelreich now appeals pro se, and we unanimously agree that oral argument is not needed. Fed. R. App. P. 34(a). For the reasons stated below, we conclude that Himmelreich's failure to exhaust hisadministrative remedies should have been excused and that the FTCA's judgment bar does not apply to this case. Consequently, we once again **VACATE** the district court's judgment and **REMAND** the case for further proceedings consistent with this opinion.

I.

The Prison Litigation Reform Act ("PLRA"), 110 Stat. 1321-71, 42 U.S.C. § 1997e(a), prevents a prisoner from filing suit "with respect to prison conditions until such administrative remedies as are available are ex-

hausted." In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court interpreted this language as requiring "proper exhaustion," meaning that a prisoner must "make full use of the prison grievance process" and "compl[y] with the system's critical procedural rules." *Id.* at 93-95. There are few exceptions to this strict rule, but we have excused a prisoner's lack of complete compliance when the improper actions of prison officials render the administrative remedies functionally unavailable. *See generally Brock v. Kenton Cnty.*, 93 F App'x 793, 798 (6th Cir. 2004) (collecting cases).

Himmelreich admits that he did not complete all of the steps in the prison grievance process, but he claims to have been "intimidated by Captain Fitzgerald into not filing any more Administrative Remedies" with regard to his Eighth Amendment claim against the B-Unit Disciplinary Team. R. 47 at 10 (Pl.'s Resp. to Mot. for Summ. J.) (Page ID #278). In determining whether Himmelreich fits within this exception, we must ask whether Captain Fitzgerald's threats and actions would "deter a person of ordinary firmness from [continuing with the grievance process]." *See Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (en banc) (internal quotation marks omitted); *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002).

Himmelreich alleges that Captain Fitzgerald told him that if Himmelreich continued with his grievances regarding the attack, "[she would] personally see that [Himmelreich was] transferred to a penitentiary and [he

would] more than likely be attacked and not just beat up." R. 47 at 7 (Pl.'s Resp. to Mot. for Summ. J.) (Page ID #275). When Himmelreich filed his FTCA lawsuit, he claimed that Captain Fitzgerald followed through with her threats and placed him in the Special Housing Unit ("SHU"). *Id.* at 11 (Page ID #279). Once Himmelreich was put in the SHU, Captain Fitzgerald allegedly yelled, "'You want to know why you're in here? You're in here because of the fuckin' Tort Claim you filed! That's why you're in here!'" R. 1 at 15 (Compl. at ¶ 66) (Page ID #15).

Unlike the vague and conclusory allegations at issue in *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 997 (6th Cir. 2004), Himmelreich's claims of intimidation are specific. If Himmelreich's allegations are true, which we must assume at this stage in the litigation, *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011), a reasonable jury could conclude that Captain Fitzgerald's actions and statements would deter a person of ordinary firmness from continuing with the grievance process. Accordingly, we conclude that Himmelreich has demonstrated that a genuine issue of material fact exists as to whether Captain Fitzgerald improperly prevented Himmelreich from exhausting his administrative remedies.

In reaching this conclusion, we reject the government's argument that Himmelreich's filing of other administrative complaints and the FTCA lawsuit near the time that he claims to have been threatened prevents a finding of intimidation. We do not believe that minor

complaints related to "requests to watch [the] *Passion of the Christ* movie," R. 45-4 at 2 (Grievance Record) (Page ID #251), and to requests "to make a [weekly] call to [his] parents while in [the] SHU," *id.* at 11 (Page ID #260), are relevant when Captain Fitzgerald purportedly told Himmelreich "that if he didn't stop [with his complaints about the assault] she would ship him to an ADX [higher-security prison], or better yet, to a [penitentiary] where she knows he will get shanked and probably killed," R. 1 at 14 (Compl. at ¶ 59) (Page ID #14). Complaints and grievances related to petty requests and those related to prison-official misconduct are wholly different, particularly when there are specific allegations in the record that Captain Fitzgerald actually retaliated against Himmelreich for filing grievances and lawsuits related to a specific assault. In our view, this retaliation and intimidation—if proven true—would render the grievance process functionally unavailable for a person of ordinary firmness. Thus, we **VACATE** the district court's grant of summary judgment on the basis of a failure to exhaust.

II.

The district court also found that the FTCA's judgment bar, 28 U.S.C. § 2676, applied in this case and, for this alternative reason, granted the government summary judgment with respect to Himmelreich's Eighth Amendment claim. Section 2676 states in full: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee

of the government whose act or omission gave rise to the claim." According to the district court, "[t]he plain language of section 2676 requires that the bar apply to all actions by the Plaintiff, not just judgments on the merits." R. 53 at 6-7 (D. Ct. Op.) (Page ID #436-37) (citing *Manning v. United States*, 546 F.3d 430, 437-38 (7th Cir. 2008)). We disagree.

A careful reading of the record shows that the district court dismissed Himmelreich's FTCA action for a lack of subject-matter jurisdiction. R. 34 at 2-5 (D. Ct. Rule 12(b)(1) Op.) (Page ID #171-74) (Case Number 4:10-cv-307); *see also* R. 31 at 1 (Gov't Rule 12(b)(1) Mot.) (Page ID #136) (Case Number 4:10-cv-307). Specifically, the district court found that the discretionary-function exception applied, which deprived the district court of subject-matter jurisdiction. Therefore, the district court granted the government's Rule 12(b)(1) motion and dismissed the action for a lack of jurisdiction. R. 34 at 2-5 (D. Ct. Rule 12(b)(1) Op.) (Page ID #171-74) (Case Number 4:10-cv-307).

A dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar. Put bluntly, in the absence of jurisdiction, the court lacks the power to enter judgment. *See* 10A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 3713 (3d ed. 1998) ("If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action."). Because we hold that district courts lack subject-matter jurisdiction over an FTCA claim when the

discretionary-function exception applies, as it did here, *see Kohl v. United States*, 699 F.3d 935, 939-40 (6th Cir. 2012), we do not view the district court's dismissal of Himmelreich's previous action as implicating the FTCA's judgment bar. Accordingly, we conclude that the district court erred in citing the judgment bar as an independent basis for granting summary judgment on Himmelreich's Eighth Amendment claim. *See* R. 53 at 6-7 (D. Ct. Op.) (Page ID #436-37).

In reaching its conclusion, the district court relied upon *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), and *Manning*, 546 F.3d 430, but it misreads both of these cases. In *Harris*, the plaintiff simultaneously filed *Bivens* and FTCA claims against the United States and government officials. 422 F.3d at 324. The district court "entered a 'judgment' on the merits of [the] FTCA claims," and we concluded that this judgment barred consideration of the plaintiff's *Bivens* claim. *Id.* at 334. Specifically, we held that § 2676 "fails to draw a distinction between a decision for or against the government" and that § 2676 bars a *Bivens* action regardless of which party prevailed on the merits of the FTCA claim. *Id.* at 334-35. Holding that a judgment on the merits, irrespective of who won, triggers the judgment bar is a far cry from holding that any disposition of an FTCA action prevents other suits, a distinction that the *Harris* panel explicitly recognized by citing *Hallock v. Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), *reversed on other grounds sub nom. Will v. Hallock*, 546 U.S. 345 (2006). *See Har-*

ris, 422 F.3d at 335. In *Hallock*, the Second Circuit stated that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a 'judgment in an action under section 1346(b) [the Federal Tort Claims Act].'" 387 F.3d at 155 (quoting 28 U.S.C. § 2676).[1] *Harris* described this precise holding in a parenthetical and cited the case approvingly. 422 F.3d at 335.

Manning does not hold to the contrary or support the district court's statement that "[t]he plain language of section 2676 requires that the bar apply to all actions by the Plaintiff, not just judgments on the merits." R. 53 at 6-7 (D. Ct. Op.) (Page ID #436-37) (citing *Manning*, 546 F.3d at 437-38). In *Manning*, the plaintiff "concede[d] that the district court entered a 'judgment' on the merits of his FTCA claim" (a fact that we believe renders *Manning* completely irrelevant to this case). 546 F.3d at 433. Nonetheless, in that case, the plaintiff argued that the judgment bar could not be "appl[ied] retroactively to nullify a *previous Bivens* judgment." *Id.* The Seventh Circuit disagreed and applied the § 2676 judgment bar

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[1] *See also Pellegrino v. U.S. Transp. Sec. Admin.*, No. 09-5505, 2014 WL 1489939, at *8-9 (E.D. Pa. April 16, 2014); *Saleh v. Wiley*, No. 09-cv-02563-PAB-KLM, 2012 WL 4356224, at *3-4 (D. Colo. June 12, 2012); *Kyei v. Beebe*, No. CV 01-1266-PA, 2005 WL 3050442, at *2 n.3 (D. Or. Nov. 13, 2005).

retroactively. *Id.* at 438. Nowhere did the Seventh Circuit hold in *Manning* that a dismissal of an FTCA claim for a lack of subject-matter jurisdiction qualifies as a judgment under § 2676. In *Williams v. Fleming*, 597 F.3d 820 (7th Cir. 2010), the Seventh Circuit expressly punted on that question, the one before us now, stating: "[w]e need not address [the] contention [that any dismissal, whether or not on the merits, suffices for application of § 2676] today. " *Id.* at 822 n.2.

Moreover, the Seventh Circuit's disposition of this question, in particular, is unhelpful. The Seventh Circuit treats the dismissal of an FTCA action due to the application of the discretionary-function exception as a decision on the merits. *See Collins v. United States*, 564 F.3d 833, 837-38 (7th Cir. 2009). We have repeatedly taken the opposite view, which is that we lack subject-matter jurisdiction over an FTCA claim if the discretionary-function exception applies in a given case. *See, e.g., Kohl*, 699 F.3d at 939-40; *Milligan v. United States*, 670 F.3d 686, 695 (6th Cir. 2012) ("[I]t is evident that the discretionary function exception bars subject matter jurisdiction for the [plaintiffs'] claims."). In other cases, a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect. *See, e.g., Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Wilkins v. Jakeway*, 183 F.3d 528, 533 n.6 (6th Cir. 1999); Restatement (Second) of Judgments § 26(1)(c) (1982). We see no reason to depart from that general rule in this situation.

In *Harris*, we also noted that the purpose of a judgment bar is to prevent the possibility of double recoveries and the cost of defending multiple suits regarding the same conduct for the government. 422 F.3d at 335-36. It is not punitive in nature. Holding that a plaintiff's filing of an FTCA action, when that statute does not permit recovery, prevents the plaintiff from alleging the correct cause of action furthers neither of these interests. Seeing no compelling reason in the text or purpose of § 2676 to conclude that a dismissal for a lack of jurisdiction triggers the judgment bar, we hold that the district court erred in applying the judgment bar here and **VACATE** its decision accordingly.

III.

For the forgoing reasons, we **VACATE** the district court's grant of summary judgment and **REMAND** for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-4212

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

J. FITZGERALD, ET AL., DEFENDANTS-APPELLEES

[Filed: Mar. 10, 2015]

ORDER

BEFORE: COLE, Chief Judge; MOORE and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Further, Himmelreich moves for an award of costs pursuant to Fed. R. App. P 39 in this appeal. The court vacated the summary judgment for defendants and remanded for further proceedings. Where a judgment is vacated, the award of costs is discretionary. Fed. R. App. P 39(a)(4). Because Himmelreich has not yet prevailed on his claims, we deny the motion. In the event he is successful below, he may seek recovery of the appellate filing fee in district court under Fed. R. App. P 39(e)(4).

ENTERED BY ORDER OF THE COURT

/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4: 10-CV-02404

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANT

[July 18, 2013]

ORDER AND DECISION

Judge JOHN R. ADAMS

I. INTRODUCTION

Defendants J. Fitzgerald, Lieutenant Butts, Correctional Officer Simmons, Ms. Bunts and Ms. Newland, request that this Court grant summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. This Court finds that Walter J. Himmelreich has not exhausted his administrative remedies with respect to his claims in this lawsuit. Summary judgment is therefore GRANTED.

II. SUMMARY OF FACTS AND BACKGROUND

Plaintiff is an inmate at the Federal Correction Institution in Elkton, Ohio. He filed his original Complaint on October 21, 2010. On March 9, 2011 this Court dismissed the case. Plaintiff appealed to the Sixth Circuit and it affirmed in part, reversed in part and remanded to this Court on May 7. 2012.

The remanded claims revisited by this Court are Constitutional claims based on the First and Eighth Amendment. The First Amendment retaliation claim is grounded in Plaintiff's allegation that he was improperly placed in administrative segregation in March 2009. Plaintiff sees his placement in administrative confinement as illegal retaliation by FCI Elkton staff for his filing of an administrative tort claim. The Eighth Amendment claim is based on Plaintiff's assertion that prison officials, specifically the B-Unit Disciplinary Team, failed to protect him from another inmate. Plaintiff alleges that the other inmate verbally threatened to physically-assault a pedophile. Plaintiff further alleges "that the Plaintiff is reputedly, among the inmate community, one of the biggest pedophiles on the Elkton compound and is aware that other inmates have that perception of him." Doc. 1 at 6. The B-Unit Disciplinary Team then placed the other inmate into the general population despite allegedly being aware of the threat. Plaintiff sees this lack of action as a failure to protect him from serious harm and therefore a violation of the Eighth Amendment. Both claims are

made pursuant to *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Estate of Smithers v. City of Flint*, 602 F.3d 758, 761 (6th Cir. 2010). A fact must be essential to the outcome of a lawsuit to be 'material.' *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Summary judgment must be entered when a party fails to make a "showing sufficient to establish an element essential to that party's case." *Celotex*, 477 U.S. at 322-23. "Mere conclusory and unsupported allegations, rooted in speculation, do not meet [the] burden." *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003).

Summary judgment creates a burden-shifting framework. *See* Anderson, 477 U.S. 250. The moving party has the initial burden of showing there is no genuine issue of material fact. *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934 (6th Cir. 2000). The burden then shifts to the nonmoving party to prove that there is an issue of material fact that can be tried. *Id.* If this burden is not met, the moving party is then entitled to a judgment as a matter of law. *Bell*, 351 F.3d at 253. The court must view the evidence in the light most favorable to the nonmoving

party when considering the motion. *Hamilton v. General Elec. Co.*, 556 F.3d 428, 433 (6th Cir. 2009).

IV. ANALYSIS

An inmate must fully exhaust his administrative remedies before seeking relief in a *Bivens* case under the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. § 1997(e)(a); *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth v. Churner*, 532 U.S. 731, 741 (2001). "Exhaustion is no longer left to the discretion of the district court, but is mandatory." *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). This process is set out for Bureau of Prisons ("BOP") inmates in 28 C.F.R. § 542.10 *et seq.* For a complaint that relates to any aspect of the inmate's life, the BOP follows this process through various steps. *Id.* The process includes multiple levels of appeal up through BOP's hierarchy of review. *Id.* The United States Supreme Court unanimously held that Congress has permissibly chosen to mandate the completion of a prison administrative remedy process that may address the inmate's complaint and provide some form of relief. *See Booth*, 532 U.S. at 741; *See also, Hampton v. Hobbs*, 106 F.3d 1281, 1288 (6th Cir. 1997) (finding the administrative remedy requirements of the PLRA do not violate an inmate's right to procedural due process).

"The point of the PLRA exhaustion requirement is to allow prison officials 'a fair opportunity' to address grievances on the merits, to correct prison errors that can and should be corrected and to create an administrative rec-

ord for those disputes that eventually end up in court." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2011); (quoting *Woodford*, 548 U.S. at 94-95). Additionally, the Court held that the PLRA's exhaustion requirement applies to all inmate suits concerning prison life. *Porter*, 534 U.S. at 516.

Furthermore, it is Defendant's burden to prove exhaustion has not occurred. *Napier v. Laurel County, Ky.*, 636 F.3d 218, 225 (6th Cir. 2011). Failure to exhaust administrative remedies is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). Plaintiff is not required to plead or show exhaustion in his complaint. *Id. Bock*, therefore, only reduces the pleading standard for inmates; proper exhaustion is still required under the PLRA. *Id.* at 218.

A. Plaintiff Has Not Exhausted His Administrative Remedies For His First Amendment Claim.

The record indicates that Plaintiff has filed eighty administrative remedy requests while incarcerated. He has exhausted only eighteen of them. None of the exhausted requests concern either claim remaining in this case. Defendant has produced clear records and the Declaration of a BOP attorney to corroborate these facts. Plaintiff has indicated that he wrote a letter to Northeast Regional Counsel, Henry Sadowski, Esq., concerning his First Amendment claim, but there is no other indication that Plaintiff completed or even engaged in the required administrative remedy process in reference to this claim.

Courts only excuse an inmate's lack of compliance with the exhaustion requirement when administrative remedies are deemed unavailable because of the improper actions of prison officials. *Brock v. Kenton County*, 93 Fed. App'x 793, 798 (6th Cir. 2004). A prisoner is still required to demonstrate his affirmative actions to comply with administrative remedy before a court can analyze if the administrative remedies actually were unavailable. *Id.* at 798.

Plaintiff fails to show any affirmative efforts to comply with the administrative remedy procedure required by *Porter* and *Woodford*. The record indicates that Plaintiff has made notes and wrote a letter to Mr. Sadowski, but these efforts do not satisfy the administrative remedy process. *See Woodford*, 548 U.S. at 94-95. Plaintiff took no further action to exhaust the administrative remedy process up through the appeals process. There is no genuine issue of material fact that Plaintiff has not satisfied the administrative remedy process for his First Amendment Claim. Accordingly, he has failed to exhaust his First Amendment claim.

B. Plaintiff Has Not Exhausted the Administrative Remedy Process for His Eighth Amendment Claim.

Again, a plaintiff must exhaust all administrative remedies before seeking relief at the district court level. *Woodford*, 548 U.S. at 85. The record shows that Plaintiff fails to exhaust the administrative remedy process for his Eighth Amendment claim in the same way that he

failed to do so for his First Amendment claim. Plaintiff contends that he exhausted the administrative remedy process by filing an administrative tort claim under the Federal Tort Claims Act ("FTCA").

Filing a claim under the FTCA does not exhaust the administrative remedy process in regard to Plaintiff's *Biven's* claims. *Macias v. Zenk*, 495 F.3d 37, 44 (2d Cir. 2007); *Adekoya v. Fed. Bureau of Prisons*, 375 F.App'x 119, 121 (2d Cir. 2010); *Ramos v. Hawk-Sawyer*, 212 F App'x 77, 79 (3d Cir. 2006). A claim under the FTCA and a *Bivens* claim under the PLRA are two separate claims. *See Nwaokocha v. Sadowski*, 369 F Supp. 2d 363, 368 (E.D.N.Y. 2005) (holding "filing of an administrative tort claim does not excuse [Plaintiff's] failure to meet the separate exhaustion requirements for a *Bivens* claim under the PLRA"). The filing of a FTCA claim does not contemporaneously satisfy the exhaustion requirement of the PLRA. *Id.* Therefore, Plaintiff's filing of an FTCA claim does not exhaust his administrative remedies for his Eighth Amendment failure to protect claim.

C. Plaintiff's Claim of Intimidation Is Unsupported.

A plaintiff is excused from exhausting the administrative remedy process only if the plaintiff can prove administrative remedies were made unavailable to him. *Brock*, 93 F App'x at 798. An inmate's general allegation that he feared retaliation from the prison staff does not meet this standard. *Boyd v. Corrections Corp. of America*,

380 F.3d 989, 997-98 (6th Cir. 2004). An inmate must specifically describe the factual basis of his fear. *Id.* at 98.

Plaintiff alleges intimidation from the prison staff and that therefore administrative remedies were unavailable to him. The intimidation Plaintiff cites is an incident when Defendant Fitzgerald "yelled" at Plaintiff about the filing of administrative remedy requests stemming from the 2008 assault. Events following this conversation do not indicate that Plaintiff experienced intimidation or was dissuaded from using the administrative process following this conversation. According to BOP records, Plaintiff filed an administrative relief request after speaking with Fitzgerald. Plaintiff filed seven different unrelated administrative remedy requests or appeals during the time that he claims to have been intimidated by his conversation with Captain Fitzgerald. Additionally, between 2008 and 2010, Plaintiff filed 19 other administrative remedy requests. Based on the facts presented to this court, Plaintiff cannot be seen as intimidated by prison personnel considering his general allegation and continued filing of administrative remedy requests subsequent to his conversation with Fitzgerald. *See Boyd*, 380 F.3d at 797-98.

D. Plaintiff's Eight Amendment Claim Is Subject to the FTCA's Judgment Bar.

28 U.S.C. § 2676 provides, "judgment in an action under the [FTCA] shall constitute a complete bar to any action by the same claimant, by reason of the same sub-

ject matter, against the employee of the government whose act of omission gave rise to the claim." The Sixth Circuit interprets the phrase "by reason of the same subject matter" to mean, "arising out of the same actions, transactions or occurrences." *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986). The bar applies to all judgments. *Harris v. United States*, 422 F.3d 322, 336 (6th Cir. 2005) (holding that the language of section 2676 does not "delimit the reach of the reach of a bar that applies to all judgments" depending on the identity of the victor in an FTCA claim). The plain language of section 2676 requires that the bar apply to all actions by the Plaintiff. not just judgments on the merits. *Manning v. United States*, 546 F.3d 430, 437-388 (7th Cir. 2008).

Section 2676's judgment bar is directly applicable to Plaintiff's Eighth Amendment claim. Plaintiff filed a separate lawsuit under the FTCA arising from the assault on Plaintiff in October 2008 and the prison staff's alleged failure to protect him from the assault. *Himmelreich v. United States of America*, N.D. Ohio, Case No. 4:10CV307. This Court granted summary judgment for the United States because the actions in controversy fell under the discretionary exception to the FTCA. *Id.*

Plaintiff's Eighth Amendment claim in this case arises out of the very same occurrence; the assault in 2008, and the same actions; the prison's alleged failure to protect. Section 2676 bars any further action on Plaintiff's Eighth Amendment failure to protect claim for this reason.

Therefore, section 2676 provides an additional basis for summary judgment on this claim.

V. CONCLUSION

Based on the reasons stated herein, Defendant's Motion for Summary Judgment is GRANTED. The complaint is DISMISSED. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

DATE: July 18, 2013

/s/ JOHN R. ADAMS
Judge JOHN R. ADAMS
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-3474

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS,

Filed: May 7, 2012

ORDER

On Appeal from the United States District Court for the Northern District of Ohio

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Before: MOORE, COOK, and WHITE, Circuit Judges.

Walter J. Himmelreich, a federal prisoner proceeding pro se, appeals the district court's *sua sponte* dismissal of his civil rights action filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. This panel unanimously agrees that oral

argument is not needed. Fed. R. App. P 34(a). For the reasons articulated below, we vacate and remand in part and affirm in part.

Relying on *Bivens*, Himmelreich filed a complaint naming as defendants: the Federal Bureau of Prisons ("BOP") and twenty of its executives; U.S. Attorney General Eric Holder; the Federal Correctional Institution—Elkton ("FCI-Elkton"); FCI-Elkton Warden J.T. Shartle; two FCI-Elkton inmates; several of FCI-Elkton's security officers, medical staff, and administrative staff; ten unknown agents of the Federal Bureau of Investigation; and ten unknown employees of the Department of Justice's Freedom of Information Act Office. Himmelreich alleged that his constitutional rights were violated by events that occurred before, during, and after defendant-inmate Peter Macari physically assaulted him. Himmelreich's complaint sought monetary damages and various forms of injunctive relief.

In accordance with the Prison Litigation Reform Act ("PLRA"), the district court screened Himmelreich's complaint. The court dismissed the action because several of the named defendants could not be sued under *Bivens* and because Himmelreich had not pled a claim against the defendants amenable to a *Bivens* suit. After unsuccessfully moving the district court for reconsideration, Himmelreich appealed.

Governing Legal Principles

We review de novo a district court's decision to dismiss a complaint pursuant to the PLRA. *Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010); *Grinter v. Knight*, 532 F.3d 567, 571-72 (6th Cir. 2008). Under 42 U.S.C. § 1997e and 28 U.S.C. §§ 1915(e) and 1915A, district courts are required "to screen and dismiss complaints that are frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief." *Grinter*, 532 F.3d at 572 (citing 28 U.S.C. § 1915A(b)); *accord* 28 U.S.C. § 1915(e) and 42 U.S.C. § 1997e. Like the district court, we must "construe [a prisoner's] complaint in the light most favorable to him [and] accept his factual allegations as true." *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005) (citation omitted). Factual allegations need not be set forth in great detail, but they must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Hill*, 630 F.3d at 470-71. Pro se complaints are "h[e]ld to less stringent standards than formal pleadings drafted by lawyers," and therefore are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

"In *Bivens*—proceeding on the theory that a right suggests a remedy—[the Supreme Court] 'recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.'" *Iqbal*, 556 U.S. at 675 (quoting

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001)). The *Bivens* Court specifically held that "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages." 403 U.S. at 389. Subsequently, the Supreme Court has recognized very few constitutional rights that can be vindicated under *Bivens*. *See Iqbal*, 556 U.S. at 675 ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" (quoting *Malesko*, 534 U.S. at 68)); *see also Minneci v. Pollard*, 565 U.S. __, 132 S. Ct. 617, 622-23 (2012) (collecting cases in which the Court declined to extend *Bivens*'s reach).

In *Davis v. Passman*, 442 U.S. 228 (1979), the Court recognized that a female deputy administrative assistant could claim damages under the Fifth Amendment's Due Process Clause against a Congressman who had fired her on the basis of her gender. And, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court recognized an implied damages action against federal prison officials for violation of the Eighth Amendment. Although the Supreme Court has thus far "declined to extend *Bivens* to a claim sounding in the First Amendment," *Iqbal*, 556 U.S. at 675 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)), our circuit has recently expressly permitted a federal prisoner's First Amendment retaliation claim to proceed under *Bivens*, *see Hill*, 630 F.3d at 471.

The Supreme Court has also restricted those who can be sued under *Bivens*. "If a federal prisoner in a BOP

facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*, 534 U.S. at 72. But, "[t]he prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP" *Id.* Nor can a *Bivens* claim be maintained on a theory of respondeat superior. *See Iqbal*, 556 U.S. at 676. And because "the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder," *Karcher v. May*, 484 U.S. 72, 78 (1987), *Bivens* does not permit suits against government employees in their official capacities, *see Malesko*, 534 U.S. at 72 ("With respect to the alleged constitutional deprivation, [the plaintiff's] only remedy lies against the individual").

In short, to plausibly state a *Bivens* claim, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution" in a manner that can be vindicated under *Bivens*. *Iqbal*, 556 U.S. at 676.

Discussion

Himmelreich assigns a litany of errors to the district court's dismissal of his complaint. Only two of his arguments are not frivolous. We begin with these two meritorious arguments.

First Amendment Retaliation

At the outset, the district court erred by analyzing Himmelreich's allegations solely as a due process viola-

tion rather than a violation of the First Amendment. The Supreme Court has instructed that "'if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)); *see Pasley v. Conerly*, 345 F. App'x 981, 984 & n.1 (6th Cir. 2009). We agree with Himmelreich's contention that he pled a First Amendment retaliation claim.

According to his complaint, in February 2009, Himmelreich filed a tort claim with the BOP seeking to recover for the injuries he sustained from the assault. In March 2009, Himmelreich "was placed in [segregation] without reason on his Administrative Detention Order." Sometime afterwards, FCI-Elkton Security Captain Fitzgerald yelled through Himmelreich's cell door: "You want to know why you're in here? You're in here because of the f***in' Tort Claim you filed! That's why you're in here!" Himmelreich remained in segregation for sixty days.

To establish a retaliation claim under the First Amendment, Himmelreich "must prove that (1) he engaged in protected conduct, (2) the defendant took an adverse action that is capable of deterring a person of 'ordinary firmness from continuing to engage in that conduct,' and (3) 'the adverse action was motivated at least in part by [Himmelreich's] protected conduct.'" *Hill*, 630

F.3d at 472 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 394, 398 (6th Cir. 1999) (en banc)). Liberally construing the complaint's allegations in the light most favorable to Himmelreich, *see id.* at 471, we conclude that he pled the three elements of a First Amendment retaliation claim.

First, Himmelreich engaged in protected conduct when he filed his administrative tort claim. *Hill*, 630 F.3d at 472. Second, Himmelreich's placement in segregation constitutes an adverse action. *Id.* at 474-75. Third, Captain Fitzgerald's alleged statement regarding why Himmelreich was in segregation supports a retaliatory motive. *Id.* at 476. As in *Hill*, Himmelreich's "inartfully" pled allegations "contained the elements of a First Amendment retaliation claim." *Id.* at 471; *see id.* at 471-72; *see also Pasley*, 345 F App'x at 984-86. Accordingly, the district court erred by not construing Himmelreich's allegations as stating a plausible First Amendment retaliation claim.

Eighth Amendment

Although the allegations in Himmelreich's complaint implicate the Eighth Amendment in two respects—failure to protect and inadequate medical care—he has only pleaded a claim upon which relief could be granted as to the first. To plead his failure-to-protect claim, Himmelreich must allege facts demonstrating that FCI-Elkton staff and security officers were deliberately indifferent "to a substantial risk of serious harm" to him. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "Deliberate indif-

ference" is pleaded through allegations "'that the official was subjectively aware of the risk' and 'disregard[ed] that risk by failing to take reasonable measures to abate it.'" *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (quoting *Farmer*, 511 U.S. at 829, 847). Thus, Himmelreich must allege facts that permit the inference that FCI-Elkton staff and security officers were either (1) aware of a substantial risk to Himmelreich, even if they were unaware of who would commit the assault, or (2) aware that Macari posed a substantial risk to a class of prisoners, even though they were unaware of the exact prisoner at risk. *See id.* (citing *Curry v. Scott*, 249 F.3d 493, 507-08 (6th Cir. 2001)); *see also Farmer*, 511 U.S. at 843 ("[I]t does not matter whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.").

Himmelreich alleges that Macari told members of the B-Unit Unit Disciplinary Team that he would "smash" an inmate who was a pedophile if he was returned to the general prison population. Himmelreich also alleges that the inmate community widely perceived him as a pedophile. Accordingly, the complaint alleges that defendant officials were subjectively aware that Macari posed a substantial risk to a class of prisoners of which Himmelreich was a member.[1] The complaint also alleges that the of-

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[1] The complaint does not specifically allege that Newland knew of Macari's threat. Without knowledge of the threat, failure to examine Macari's file and learn of his history of violence would at most support a finding of negligence rather than deliberate indif-

ficials disregarded that risk by releasing Macari back into the general population. Therefore, Himmelreich has pleaded an Eighth Amendment claim based on failure to protect, which should be allowed to proceed.

By contrast, the district court properly dismissed Himmelreich's Eighth Amendment claim based on allegedly inadequate medical treatment. In evaluating Eighth Amendment claims grounded on the medical treatment received, "'[w]e distinguish between cases where the complaint alleges a complete denial of medical care and those cases where the claim is that a prisoner received inadequate medical treatment.'" *Alspaugh v. McConnell*, 643 F.3d 162, 169 (6th Cir. 2011) (quoting *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976)). When a prisoner grounds a constitutional violation on inadequate medical treatment, he states a viable claim only if his treatment was "'so woefully inadequate as to amount to no treatment at all.'" *Id.* (quoting *Westlake*, 537 F.2d at 860 n.5). But in cases "[w]here a prisoner alleges only that the medical care he received was inadequate, 'federal courts are generally reluctant to second

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ference. *See Farmer*, 511 U.S. at 835 ("[D]eliberate indifference describes a state of mind more blameworthy than negligence."). The district court was thus correct that Himmelreich has not pleaded a cause of action for violation of the Eighth Amendment against Newland. However, Himmelreich also named members of the B-Unit Disciplinary Team, who allegedly were aware of Macari's threat, as defendants in this lawsuit.

guess medical judgments.'" *Id.* (quoting *Westlake*, 537 F.2d at 860 n.5).

Here, Himmelreich's claim falls short of a constitutional violation. According to the allegations in his complaint, Himmelreich was examined by a nurse shortly after the assault. When he had difficulty breathing a few hours later, the same nurse re-examined him and a medical administrator authorized "a combination of Tylenol and Motrin for [Himmelreich's] pain and breathing difficulties." R.1 at 12, ¶ 51. Two days later, medical personnel performed a series of head and chest x-rays on Himmelreich. Thus, Himmelreich obviously received medical care for his injuries. And because his lawsuit, in essence, asks the court to "'second guess medical judgments,'" Himmelreich fails to state an Eighth Amendment claim based on inadequate medical care. *Alspaugh*, 643 F.3d at 169 (quoting *Westlake*, 537 F.2d at 860 n.5).

Miscellaneous

Himmelreich's remaining arguments need not detain us long. The district court properly dismissed the claims against the bulk of the defendants. The BOP and FCI-Elkton cannot be sued under *Bivens*. *See Malesko*, 534 U.S. at 72; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). Because Himmelreich alleged that Attorney General Holder and Warden Shartle were liable only due to their supervisory positions, they cannot be sued under *Bivens* either. *See Iqbal*, 556 U.S. at 676. And it is well-settled that only actual government employees—not federal inmates—can

be sued under *Bivens*. *See id.* at 675-76; *Malesko*, 534 U.S. at 72; *Meyer*, 510 U.S. at 486. Furthermore, Himmelreich cannot sue under *Bivens* for a refund of his medical co-pay. *See Iqbal*, 556 U.S. at 675-76. Nor can a *Bivens* claim be used to compel the government to bring assault charges against Macari. *See id.* Finally, Himmelreich should not have been given an opportunity to amend his complaint before the district court *sua sponte* dismissed his case. We have clearly held that when a complaint is subjected to PLRA screening, "the district courts are not to permit plaintiffs to amend a complaint to avoid dismissal pursuant to [the PLRA's] provisions." *Benson v. O'Brian*, 179 F.3d 1014, 1016 (6th Cir. 1999); *see Moniz v. Hines*, 92 F App'x 208, 211-12 (6th Cir. 2004).

For the foregoing reasons, we vacate the district court's judgment on Himmelreich's First Amendment retaliation claim and Eighth Amendment failure-to-protect claim, and remand this claim for further proceedings not inconsistent with this order. We affirm the judgment in all other respects. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ [ILLEGIBLE]
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. 4:10 CV 2404

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

Filed: Mar. 9, 2011

MEMORANDUM OF OPINION AND ORDER

Judge JOHN R. ADAMS

Pro se Plaintiff Walter J. Himmelreich filed this *Bivens*[1] action against the United States Bureau of Prisons ("BOP"), the Elkton Federal Correctional Institution ("FCI Elkton"), Federal Inmate Peter B. Macari, Federal Inmate Roger Oberkramer, former FCI Elkton Security Captain J. Fitzgerald, FCI Elkton SIS Security Officer Lieutenant Butts, FCI Elkton Corrections Officer Simmons, FCI Elkton Health Care Administrator Bunts,

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[1] *Bivens v. Six Unknown Agents*, 403 U.S. 383 (1971).

FCI Elkton Psychology Department Staff Physician Dr. Lefever, FCI Elkton Nurse Newland, FCI Elkton Warden J.T. Shartle, and United States Attorney General Eric Holder. In the Complaint, Himmelreich alleges he was physically assaulted by two other inmates. He seeks monetary damages.

Background

Himmelreich alleges he and Oberkramer got into a verbal altercation on October 11, 2008. Oberkramer told Himmelreich that he was going to put his head through the glass door of the TV room. Upon seeing the surveillance cameras, he told Himmelreich he would retaliate at a time and place where he would not be observed. Himmelreich claims he could not find an opportunity to have a private conversation with a security officer to convey the threat.

At the time this verbal altercation occurred, Macari was in disciplinary segregation. Macari was scheduled to be released from segregation on October 14, 2008, but refused to go to the general population claiming he was experiencing a great deal of stress. He proclaimed he would not be able to live with pedophiles and would "smash" one if forced to return to the general population. (Compl. at 5.). Himmelreich claims he is reputed to be "one of the biggest pedophiles on the Elkton compound." (Compl. at 5.) He further contends that Macari's Pre-Sentence Report shows he has a history of committing violent crimes. Himmelreich claims Newland, the case

manager, should have known that Himmelreich would be in danger if Macari was released from segregation.

Macari was moved to the general population on October 20, 2008. Later that day, October 20, 2008, Himmelreich was attacked by Oberkramer and Macari. Himmelreich was returning from his work detail and had just climbed the stairs to Unit B, when he was approached by the other two inmates. He contends Officer Simmons was standing outside, approximately ten feet from the sally port door of Unit B, smoking a cigarette. Another officer was stationed at the door to Unit A, but was not at his post. Himmelreich claims Macari began to hit and kick him while Oberkramer held the door closed so he could not escape. Other inmates returning to the unit began to yell, "fight!" in the stairwell, but neither Officer Simmons nor the officer from Unit A responded. Himmelreich states that the attack lasted for approximately a minute, until the "move is closed" announcement was made. (Compl. at 5C.) At that point, the inmates retreated into the unit. Himmelreich initially went to his cell to assess the damage and then he returned to the scene of the attack to wait for Officer Simmons.

Himmelreich was taken to the Lieutenant's Office and questioned about the incident. He was asked to identify his attackers, and was able to point out Oberkramer. Macari voluntarily surrendered to the Lieutenant's office. All three inmates were taken separately to the medical department to be treated for their injuries and then escorted to segregation.

At 9:30 p.m., Himmelreich complained he was having difficulty inhaling. He was taken to the medical department. Nurse Folkwein was on duty and examined him. She concluded he required a higher level of care than she could provide but was unable to reach the on-call physician. The administrator she contacted would not authorize a trip to an outside facility and ordered a combination of Tylenol and Motrin. Himmlreich was then returned to segregation for the night. On October 22, 2008, he received x-rays of his chest and head. He does not provide the results of these x-rays. He claims he began to suffer from Tinnitus after the assault. He reported to sick call. He contends he was not charged a co-pay for this visit because it was related to the attack; however he was charged the co-pay for subsequent visits. He filed grievances but his funds were not returned. He claims he visited the Psychology Department at FCI Elkton in November 2008. He states he was told by Dr. Lefever that he was safe at Elkton. He claims the Defendants were deliberately indifferent to his safety and to his serious medical needs.

Himmelreich attempted to pursue other remedies against the inmates and the United States. He asked Lieutenant Butts to file charges against the inmates with the FBI. He later learned the FBI would not initiate a criminal investigation. He filed an action under the Federal Tort Claims Act, in February 2009, claiming that prison officials failed to protect him from Macari's attack. That action, *Himmelreich v. United States*, No.

4:10CV307 (N.D. Ohio Nov. 18, 2010) (Adams, J.) was dismissed on the merits. He claims that shortly after he filed the action in federal court, he was placed in segregation without receiving an explanation. He claims Captain Fitzgerald told him that he was in segregation for filing the tort claim. He claims he was denied Due Process and was subjected to cruel and unusual punishment.

Analysis

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the district court is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact.[2] *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). For the reasons stated below, this action is dismissed pursuant to section 1915(e).

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[2] An *in forma pauperis* claim may be dismissed *sua sponte*, without prior notice to the plaintiff and without service of process on the defendant, if the court explicitly states that it is invoking section 1915(e) [formerly 28 U.S.C. § 1915(d)] and is dismissing the claim for one of the reasons set forth in the statute. *McGore v. Wrigglesworth*, 114 F.3d 601, 608-09 (6th Cir. 1997); *Spruytte v. Walters*, 753 F.2d 498, 500 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Harris v. Johnson*, 784 F.2d 222, 224 (6th Cir. 1986); *Brooks v. Seiter*, 779 F.2d 1177, 1179 (6th Cir. 1985).

I. Defendants

As an initial matter, Himmelreich names several Defendants who are not subject to suit in a *Bivens* action. *Bivens* provides a cause of action against individual officers acting under color of federal law alleged to have acted unconstitutionally. *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 70 (2001). A *Bivens* action therefore cannot be brought against a federal prison, the Bureau of Prisons, or the United States Government. *Id.* Himmelreich's claims against the BOP, and FCI Elkton, therefore, must be dismissed.

Moreover, claims against a federal officer in his official capacity impose liability on the office he represents. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Warden J.T. Shartle and Attorney General Eric Holder are federal officers employed representing the United States Government. Claims against them in their official capacities must also be dismissed.

Finally, *Bivens* claims may only be brought against individuals acting under color of federal law. Generally to be considered to have acted under color of federal law, the person must be a United States government official or employee. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Macari and Oberkramer are inmates in a federal correctional institution, not government officials. They are not subject to suit in a *Bivens* action.

II. Respondeat Superior

To the extent Himmelreich was bringing claims against Eric Holder and J.T. Shartle in their individual capacities, he has not stated a claim cognizable under *Bivens*. He states these individuals are liable to him for damages under the doctrine of *respondeat superior*. *Respondeat superior* is not a proper basis for liability in a *Bivens* action. *See Nwaebo v. Hawk-Sawyer*, No. 03-3801, 2003 WL 22905316, at *1 (6th Cir. Nov. 28, 2003) (citing *Rizzo v. Goode*, 423 U.S. 362, 373-77(1976)); *Hall v. United States*, 704 F.2d 246, 251 (6th Cir. 1983); *Kesterson v. Fed. Bureau of Prisons*, No. 02-5630, 2003 WL 1795886 (6th Cir. April 2, 2003); *see also Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (to be subject to *Bivens* liability, a defendant must have had "direct, personal participation" in the constitutional violation). The liability of supervisors cannot be based solely on the right to control employees, nor simple awareness of employees' misconduct. *See Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). Furthermore, "a supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'" *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). At a minimum, a plaintiff must show that the supervisor implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Id. There are no allegations in the Complaint that reasonably suggest either Warden Shartle or United States Attorney General Eric Holder were personally involved in the assault, or implicitly authorized or approved of the actions of prison personnel in relation to the assault. Accordingly, the claims against them must be dismissed.

III. Eighth Amendment

Himmelreich claims the Defendants failed to adequately protect him from an inmate assault and did not provide him with proper medical care for his injuries. Prison officials may not deprive inmates of "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The Supreme Court in *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), set forth a framework for courts to use when deciding whether certain conditions of confinement constitute cruel and unusual punishment prohibited by the Eighth Amendment. A plaintiff must first plead facts which, if true, establish that a sufficiently serious deprivation has occurred. *Id.* Seriousness is measured in response to "contemporary standards of decency." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). Routine discomforts of prison life do not suffice. *Id.* Only deliberate indifference to serious medical needs or extreme deprivations regarding the conditions of confinement will implicate the protections of the Eighth Amendment. *Id.* at 9. A plaintiff must also establish a subjective element showing the prison officials acted with a sufficiently culpable state of mind. *Id.* Deliberate indifference is characterized by obduracy or wantonness,

not inadvertence or good faith error. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Liability cannot be predicated solely on negligence. *Id.* A prison official violates the Eighth Amendment only when both the objective and subjective requirements are met. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

As a threshold matter, Himmelreich fails to establish the objective component of his claims against Captain Fitzgerald and Lieutenant Butts. He alleges he filed a grievance after his attack concerning the state of security at FCI Elkton. He alleges Captain Fitzgerald's response to his criticism was defensive and unhelpful. He claims Lieutenant Butts told him he would file a report with the FBI, but the FBI would not proceed with an investigation. Responding to a grievance or otherwise participating in the grievance procedure is insufficient to trigger liability under 42 U.S.C. § 1983. *Shehee v. Luttrell*, 199 F.3d. 295, 300 (6th Cir. 1999). Even if Captain Fitzgerald's response sounded defensive or unsympathetic, it would not state a claim under the Eight Amendment. Verbal harassment and offensive comments are generally not cognizable as constitutional deprivations. *See Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987). In addition, Himmelreich does not indicate how Lieutenant Butts's failure to report the incident to the FBI violated civilized standards of humanity and decency. *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981). These allegations do not rise to the level of a Constitutional violation.

Similarly, Himmelreich does not allege facts to suggest Bunts, Dr. Lefever, or Nurse Folkwein were deliberately indifferent to his serious medical needs. There are no allegations against Bunts. Himmelreich claims he was treated by Nurse Folkwein after the assault. She was unable to contact the physician on call and was denied permission from an administrator to take him to an outside medical provider. He was given Tylenol and Motrin for the pain. He does not indicate the nature of his injuries. He states he was given chest and head x-rays. He does not provide the results of those tests. He contends he saw Dr. Lefever in the Psychology Department approximately a month after the assault. He alleges he was told he was safe. There is no indication in any of these allegations that Himmelreich was denied treatment for a serious medical condition.

In addition, Himmelreich has not established the Defendants acted with a sufficiently culpable mental state to justify a finding of liability under the Eighth Amendment. An official acts with deliberate indifference when "he acts with criminal recklessness," a state of mind that requires that the official act with conscious disregard of a substantial risk of serious harm. *Id.* at 837. Mere negligence will not suffice. *Id.* at 835-36. Himmelreich alleges Newland should have been familiar with the files of the inmates in her unit and should have been aware of the threats Macari made in segregation against pedophiles. He further claims she should have known he would be a target if Macari was released to the general population.

He also contends that Corrections Officer Simmons was smoking and not at his post when the assault occurred. These allegations describe conduct which is negligent at best. There are no facts in the Complaint which reasonably suggest these individuals acted with a sufficiently culpable state of mind to trigger Eighth Amendment protections.

IV. Disciplinary Segregation

Finally, Himmelreich contends he was denied due process when he was placed in segregation without explanation in 2009. The Fourteenth Amendment provides a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. In addition to setting the procedural minimum for deprivations of life, liberty, or property, the Due Process Clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). It does not prohibit every deprivation by the state of a person's life, liberty or property. *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994). Only those deprivations of constitutionally protected interests which are conducted without due process are subject to suit under 42 U.S.C. § 1983. *Id.*

Prisoners have narrower liberty interests than other citizens as "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations un-

derlying our penal system." *Sandin v. Conner*, 515 U.S. 472, 485 (1995). The question of what process is due is answered only if the inmate establishes a deprivation of a constitutionally protected liberty interest. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The Due Process Clause, standing alone, confers no liberty interest in freedom from state action taken within the sentence imposed. *Sandin*, 515 U.S. at 480. "Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.* at 485. "[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Wilkinson*, 545 U.S. at 221.

Generally, unless placement in disciplinary confinement is accompanied by a withdrawal of good time credits or is for a significant period of time that presents an unusual hardship on the inmate, no interest to remain free of disciplinary confinement will be found in the case. *Sandin*, 515 U.S. at 484. Assignment to a super-maximum security prison, for example, triggers due process protections, *Wilkinson*, 545 U.S. at 224, while temporary placement in disciplinary confinement was considered to be "within the range of confinement normally expected for one serving an indeterminate term of 30 years to life," *Sandin*, 515 U.S. at 487. Similarly, the Sixth Circuit Court of Appeals has held a prisoner's designation as a member of a security threat group did not give rise to a liberty interest. *Harbin-Bey v. Rutter*, 420 F.3d 571, 577

(6th Cir. 2005). There is no indication Himmelreich was sanctioned with the loss of good time credits. Absent other allegations, Himmelreich's placement in segregation for a period of 60 days does not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

Himmelreich also contends his placement in segregation was a violation of the Eighth Amendment. There was nothing in the Complaint to indicate that the conditions to which he was subjected in the segregation unit constituted cruel and unusual punishment.

Conclusion

Accordingly, this action is dismissed pursuant to 28 U.S.C. § 1915(e). The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[3]

IT IS SO ORDERED.

Date: Mar. 9, 2011

/s/ JOHN R. ADAMS
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

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[3] 28 U.S.C. § 1915(a)(3) provides:

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Nov. 18, 2010

MEMORANDUM OF OPINION AND ORDER

Judge JOHN R. ADAMS

Pending before the Court is the Government's motion to dismiss (Doc. 31) Plaintiff Walter J. Himmelreich's complaint. Himmelreich has opposed the motion. Following review of the pleadings and relevant law, the motion to dismiss is GRANTED. The complaint is hereby DISMISSED.

I. Facts

Himmelreich filed his complaint as an appeal from the denial of an administrative tort claim. Accordingly, he

seeks relief under the Federal Tort Claims Act ("FTCA"). While the complaint itself contains no factual allegations, Himmelreich's supporting documents make his claim clear. Himmelreich contends that the Government failed to protect him from an assault perpetrated by another inmate. Specifically, Himmelreich contends that prison officials had notice of the assailant inmate's intent to harm and did nothing to protect against it. In fact, Himmelreich's administrative claim for damages begins "I was intentionally assaulted by inmate Peter Macari after he told staff member(s) that it was his intention." Doc. 1-1 at 3.

On October 13, 2010, the Government moved to dismiss the complaint. In its motion, the Government contends that the discretionary function exception to the FTCA supports dismissal. On November 10, 2010, Himmelreich opposed the motion. The Court now resolves the matter.

II. Legal Standard and Analysis

There is no dispute that Himmelreich's claim falls under the FTCA. Accordingly, the sole issue before the Court is whether the discretionary function exception applies to the facts alleged by Himmelreich.

Under the FTCA, the United States has consented, subject to certain exceptions, to suit for damages for personal injuries caused by the negligence of government employees acting within the course and scope of their employment. *See* 28 U.S.C. §§ 1346(b), 2671-2680. The

FTCA's waiver of sovereign immunity is limited by the discretionary function exception. 28 U.S.C. § 2680(a) provides that the United States has not consented to suit where the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." As the United States has not waived its sovereign immunity with respect to discretionary functions, this Court lacks subject matter jurisdiction over acts falling within the discretionary function exception. *Rosebush v. United States*, 119 F.3d 438, 440 (6th Cir. 1997).

This Court must utilize a two-part test to determine whether a governmental act falls within the exception. First, the Court must determine whether the act involves "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322, (1991) (quotation marks omitted). If the Court answers that question in the affirmative, then it must ask "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 322-23 (quotation marks omitted).

With respect to the first question before the Court, the Sixth Circuit has previously determined that the provisions at issue herein regarding inmate safety involve judgment. *See Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392 (6th Cir. 2004). In *Montez*, the Circuit explicitly rejected the argument put forth by

Himmelreich that 18 U.S.C. § 4042(a) creates a mandatory duty of care upon the Bureau of Prisons thereby eliminating any discretion. "[T]he duty imposed by § 4042(a) is of a general nature, broadly requiring that the BOP 'provide for the safekeeping' and 'provide for the protection' of federal inmates. BOP officials are given no guidance, and thus have discretion, in deciding how to accomplish these objectives." *Montez*, 359 F.3d at 396. Accordingly, the Court answers the first prong of its inquiry in the affirmative.

Next, the Court must determine whether the prison officials' decision "is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. While this presents a closer question under the facts alleged, *Montez* compels a conclusion that the exception applies herein.

While Himmelreich has never described the precise nature of the alleged threat made by the assailant inmate, the record makes clear that the inmate threatened to "smash a pedophile" if he was returned to general population. Doc. 31-2 at 3. This indicates a general threat to a substantial portion of the population of the prison. Himmelreich has never alleged that a direct threat to him was made and indeed seems to acknowledge the accuracy of the description of the type of threat as detailed by the Government. Accordingly, the Court must decide whether the prison officials' decision to release the inmate back into general population despite this threat subjects them to liability.

Since the policy at issue provides for discretion, Himmelreich must do the following to survive a motion to dismiss:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

Gaubert, 499 U.S. at 324-25.

With respect to the facts as alleged by Himmelreich, *Montez* is particularly instructive:

> As a general principle, a complaint that alleges the existence of a specific and immediate threat against an inmate is more likely to survive a motion to dismiss than a complaint that either alleges a nonspecific threat or provides only conclusory statements regarding the existence of a threat. This follows from the fact that decisions by prison officials to ignore specific and immediate threats against in-

> mates are less likely to be the type of decision that can be said to be grounded in the underlying policy of the BOP, which requires prison officials to provide for the safekeeping and protection of inmates. See 18 U.S.C. § 4042(a). In light of this general principle, we regard *Dykstra* as a close case because the prison officials apparently knew that Dykstra was at a higher risk of sexual assault and that the inmate who eventually attacked Dykstra had been staring at him.

Montez, 359 F.3d at 398. Similar to the plaintiff in *Montez*, Himmelreich's complaint and accompanying argument offer "nothing more than a bare assertion that the discretionary function exception does not apply[.]" *Id.*

Himmelreich has not alleged any specific threat and provided only conclusory statements regarding a general threat that was made by another inmate. Accordingly, Himmelreich "has failed [] to allege any facts establishing that [the prison official's] decision was not grounded in policy considerations." *Dykstra v. United States Bureau of Prison*, 140 F.3d 791, 796 (8th Cir. 1998) (cited approvingly in *Montez*, supra). Additionally, the Court notes that it is Himmelreich, not the United States, that must assert these facts. *Id.* Himmelreich

> has not done so, and probably could not succeed in doing so in any event. Prison officials supervise inmates based upon security levels, available resources, classification of inmates, and other factors. These factors upon which prison officials base such

> decisions are inherently grounded in social, political, and economic policy. We have no difficulty in concluding that the discretionary function exception applies to the correctional officer's decision not to place [the prisoner] in protective custody or to take other protective action.

Id. The above-conclusion is even stronger herein. Elkton Prison Unit Manager Jason Streeval filed an affidavit in support of the Government's motion to dismiss. Streeval's affidavit makes clear that the prison official's determination was grounded in a policy decision. Streeval explained that inmates often posture by threatening to harm pedophiles and rarely carry out such threats. Accordingly, prison "[s]taff weighed what he said but without a more specific threat against a particular inmate" determined that a return to general population was appropriate.

Based upon the above precedents, it is clear that the decisions challenged by Himmelreich fall within the discretionary function exception. Accordingly, the Government's motion to dismiss is GRANTED.

III. Conclusion

Plaintiff Walter Himmelreich's complaint is hereby DISMISSED. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

Date: Nov. 18, 2010 /s/ JOHN R. ADAMS
Judge JOHN R. ADAMS
UNITED STATES
DISTRICT COURT

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Nov. 18, 2010

JUDGMENT ENTRY

Judge JOHN R. ADAMS

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Government's motion to dismiss is GRANTED. The complaint is hereby DISMISSED. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Plaintiff may not take an appeal from the Court's decision in good faith.

IT IS SO ORDERED.

Nov. 18, 2010
Date

/s/ JOHN R. ADAMS
Judge JOHN R. ADAMS
United States District Court

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 4:10cv307

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Mar. 6, 2012

ORDER

Appellant/Petitioner having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant/petitioner has failed to satisfy the following obligation(s):

The proper fee was not paid by March 5, 2012.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ [ILLEGIBLE]

Issued: Mar. 06, 2012

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Aug. 30, 2012

ORDER

Judge JOHN ADAMS

Pending before the Court is Plaintiff Walter Himmelreich's motion "to recall judgment." The motion is DENIED.

This Court dismissed Himmelreich's complaint on November 18, 2010. Specifically, the Court found that the discretionary function exception applied to bar Himmelreich's claim against the Government. In his latest motion, Himmelreich contends that a partial reversal in another case he filed merits vacating the decision in this matter. This argument has no merit.

In addition to his complaint against the Government, Himmelreich also raised *Bivens* claims and Eighth Amendment claims against numerous prison officials. This Court dismissed the complaint. On appeal, the Sixth Circuit found that Himmelreich has properly alleged Eighth Amendment claims against certain prison officials. Contrary to Himmelreich's contentions, the Sixth Circuit made no findings that the officials were negligent or deliberately indifferent. Rather, the Circuit found that Himmelreich had made sufficient allegations to survive dismissal at the initial stage of the case.

The Sixth Circuit decision does not constitute new evidence that would support vacating this Court's prior decision. Moreover, nothing contained in that decision provides any reason for the Court to revisit its prior legal analysis.

The remainder of Himmelreich's motion re-argues the merits of his case. The Court rejected those arguments previously. Himmelreich's appeal from that dismissal was dismissed for lack of prosecution. He may not now use a motion to vacate as a substitute for his appeal. His arguments, therefore, are rejected.

The motion to recall judgment and/or vacate the Court's prior decision is DENIED. The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[1]

---

[1] 28 U.S.C. § 1915(a)(3) provides:

IT IS SO ORDERED.

Aug. 30, 2012 /s/ JUDGE JOHN R. ADAMS
JUDGE JOHN R. ADAMS
UNITED STATES
DISTRICT COURT

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-4142

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Filed: May 29, 2013

ORDER

On Appeal from the United States District Court for the Northern District of Ohio

---

Before: MARTIN, GILMAN, and KETHLEDGE, Circuit Judges.

Walter J. Himmelreich, a pro se federal prisoner, appeals a district court order denying his motion for relief from judgment in a case he filed pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. He also moves to stay this appeal pending the disposition of a case before the Supreme Court. This case has been re-

ferred to a panel of the court pursuant to Federal Rule of Appellate Procedure 34(a)(2)(C). Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Himmelreich originally filed this action under the FTCA, complaining that he had been assaulted by a fellow prisoner who was allowed in the general population despite his threats that he would assault pedophiles. The district court held that it lacked jurisdiction over the claim because it was barred by the discretionary function exception in 28 U.S.C. § 2680(a). This Court denied Himmelreich in forma pauperis status on appeal and subsequently dismissed the appeal for failure to prosecute.

Meanwhile, Himmelreich was also pursuing a *Bivens* action that arose out of the same incident against numerous defendants, which was dismissed by the district court for failure to state a claim. This Court affirmed that order in part and vacated and remanded it in part, holding that claims of First Amendment retaliation and Eighth Amendment failure to protect were stated against some of the defendants. Himmelreich then filed a motion for relief from judgment in his FTCA action, asserting that a footnote in this court's order in the *Bivens* action, stating that one defendant was at most negligent and therefore no claim was stated against her for failure to protect under the Eighth Amendment, somehow rendered the district court's dismissal of his FTCA complaint under the discretionary function exception invalid. The district court disagreed and denied the motion. Him-

melreich reasserts his argument for relief from judgment on appeal.

The denial of a motion for relief from judgment is reviewed for an abuse of discretion, which will be found only where the district court has committed a clear error. *Coyer v. HSBC Mortg. Servs., Inc.*, 701 F.3d 1104, 1110 (6th Cir. 2012). The district court originally dismissed Himmelreich's complaint for lack of jurisdiction because the acts complained of fell within the discretionary function exception. *See Rosebush v. United States*, 119 F.3d 438, 440 (6th Cir. 1997). The district court did not abuse its discretion in concluding that this Court's order in Himmelreich's appeal in his *Bivens* action provided no basis for relief from the dismissal.

Himmelreich's motion to stay this appeal pending the disposition of a case before the Supreme Court is moot because the case in question has been decided, and it has no bearing on this appeal. *Millbrook v. United States*, 133 S. Ct. 1441 (2013), dealt with a different exception to the FTCA, the intentional-tort exception in 28 U.S.C. § 2680(h), applying to an assault by a federal employee.

Accordingly, the motion to stay is denied and the district court's order denying the motion for relief from judgment is affirmed. Fed. R. App. P 34(a)(2)(C).

ENTERED BY ORDER OF THE COURT

/s/ [ILLEGIBLE]
Clerk

APPENDIX K

1. 28 U.S.C. 1346(b) provides:

United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

2. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

3. 28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money dam-

ages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therin to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee

was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provision of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title,

such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

4. 28 U.S.C. 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any Claim based upon an action or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

---

[1] So in original

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

ORIGINAL

Supreme Court, U.S.
FILED
SEP 22 2015
OFFICE OF THE CLERK

RECORD
AND
BRIEFS

No. 15-109

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE SIMMONS and BRIAN BUTTS,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Supreme Court Rule 39, Respondent Walter Himmelreich, a federal inmate, respectfully moves for leave to proceed *in forma pauperis* for the purpose of filing the attached brief in opposition to the petition for a writ of certiorari and for all subsequent proceedings in this Court. Leave to proceed *in forma pauperis* was sought and granted in the proceedings below. *See* D. Ct. Dkt. 6 (order granting motion to proceed *in forma pauperis*); D. Ct. Dkt. 64 (order granting motions to appeal *in forma pauperis*); Fed. R. App. P. 24(a)(3). The court below did not appoint counsel.

Respondent's declaration in support of this motion is attached.

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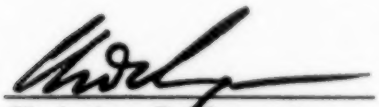
Law Library

Dated: September 22, 2015

Respectfully submitted,



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Counsel of Record
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Counsel for Respondent

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Walter Himmelreich, respondent am the ~~petitioner~~ in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment (Prison Wages)	$ 20.00	$ N/A	$ 20.00	$ N/A
Self-employment	$ N/A	$ N/A	$ N/A	$ N/A
Income from real property (such as rental income)	$ N/A	$ N/A	$ N/A	$ N/A
Interest and dividends	$ N/A	$ N/A	$ N/A	$ N/A
Gifts	$ 20.00	$ N/A	$ - 0 -	$ N/A
Alimony	$ N/A	$ N/A	$ N/A	$ N/A
Child Support	$ N/A	$ N/A	$ N/A	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ N/A	$ N/A	$ N/A	$ N/A
Disability (such as social security, insurance payments)	$ N/A	$ N/A	$ N/A	$ N/A
Unemployment payments	$ N/A	$ N/A	$ N/A	$ N/A
Public-assistance (such as welfare)	$ N/A	$ N/A	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A	$ N/A	$ N/A
Total monthly income:	$ 40.00	$ N/A	$ 20.00	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Federal Bureau of Prisons		Since 2007	$ 20 - 60
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Not Married - Not Applicable			$
			$
			$

4. How much cash do you and your spouse have? $ 8.33
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Inmate Trust Fund	Savings Account	$ 8.33	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. Not Applicable

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Not Applicable

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Samantha Carr	Daughter	17

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 20.00 plus	$ N/A
Home maintenance (repairs and upkeep)	$ N/A	$ N/A
Food	$ N/A	$ N/A
Clothing	$ N/A	$ N/A
Laundry and dry-cleaning	$ N/A	$ N/A
Medical and dental expenses	$ N/A	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health Obamacare	$ N/A	$ N/A
Motor Vehicle	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ N/A	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A
Total monthly expenses:	$ 20.00 plus	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☒ Yes ☐ No

If yes, how much? $ 10.00

If yes, state the person's name, address, and telephone number:

Walter Himmelreich paid to the Inmate Trust Fund Commissary for typing supplies and postage stamps.

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am a Federal Inmate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 3, 2015, 20__

(Signature)

Inmate Inquiry

PRINT

Inmate Reg #:	13152067	**Current Institution:**	Danbury FCI
Inmate Name:	HIMMELREICH, WALTER	**Housing Unit:**	DAN-D-A
Report Date:	08/03/2015	**Living Quarters:**	D05-0051
Report Time:	2:00:40 PM		

General Information | Account Balances | Commissary History | Commissary Restrictions | Comments

General Information

Administrative Hold Indicator:	No
No Power of Attorney:	No
Never Waive NSF Fee:	No
Max Allowed Deduction %:	100
PIN:	8308
PAC #:	433793667
Revalidation Date:	7th
FRP Participation Status:	Participating
Arrived From:	ELK
Transferred To:	
Account Creation Date:	8/3/2005
Local Account Activation Date:	4/30/2014 3:19:17 AM
Sort Codes:	
Last Account Update:	8/2/2015 4:32:20 PM
Account Status:	Active
Phone Balance:	$3.40

Pre-Release Plan Information

Target Pre-Release Account Balance:	$99,999.99	
Pre-Release Deduction %:	0%	
Income Categories to Deduct From:	✓ Payroll	Outside Source Funds

FRP Plan Information

FRP Plan Type	Expected Amount	Expected Rate
Quarterly	$25.00	0%

Account Balances

Account Balance:	$8.33
Pre-Release Balance:	$8.33
Debt Encumbrance:	$0.00
SPO Encumbrance:	$0.00
Other Encumbrances:	$0.00

Outstanding Negotiable Instruments:	$0.00
Administrative Hold Balance:	$0.00
Available Balance:	$0.00
National 6 Months Deposits:	$384.09
National 6 Months Withdrawals:	$398.37
Available Funds to be considered for IFRP Payments:	($115.91)
National 6 Months Avg Daily Balance:	$40.72
Local Max. Balance - Prev. 30 Days:	$60.31
Average Balance - Prev. 30 Days:	$29.43

Commissary History

Purchases

Validation Period Purchases:	$26.45
YTD Purchases:	$245.80
Last Sales Date:	7/20/2015 8:34:28 AM

SPO Information

SPO's this Month:	0
SPO $ this Quarter:	$0.00

Spending Limit Info

Spending Limit Override:	No
Weekly Revalidation:	No
Bi-Weekly Revalidation:	Yes
Spending Limit:	$180.00
Expended Spending Limit:	$0.00
Remaining Spending Limit:	$180.00

Commissary Restrictions

Spending Limit Restrictions

Restricted Spending Limit:	$0.00
Restricted Expended Amount:	$0.00
Restricted Remaining Spending Limit:	$0.00
Restriction Start Date:	N/A
Restriction End Date:	N/A

Item Restrictions

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Comments:

No. 15-109

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE SIMMONS & BRIAN BUTTS,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") provides that, for certain enumerated categories of claims, the Act's provisions—including its jurisdictional grant to the district courts—"shall not apply." 28 U.S.C. § 2680. One of the Act's provisions bars suits against federal employees subsequent to a "judgment" in an action "under" the Act arising from the same subject matter. *Id.* § 2676.

The question presented is: If a claim against the Government is dismissed for lack of subject-matter jurisdiction because it falls within the scope of § 2680, is that a "judgment" in an action "under" the FTCA, so as to trigger the judgment bar, even though the judgment bar does "not apply" to claims encompassed by § 2680 and, in any event, such a jurisdictional dismissal has no claim-preclusive effect?

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STATEMENT

Petitioners are officers at the federal correctional institution in Elkton, Ohio, where Respondent Walter Himmelreich was serving a sentence for the production of child pornography. He filed this action against them (and others) under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Petitioners violated his Eighth Amendment rights by allowing another inmate, who while in segregated confinement threatened to "smash" a pedophile upon return to the general population, to nonetheless return there four days later. Several hours later on that same day, the inmate violently assaulted Himmelreich, causing serious injuries. In an earlier appeal, a unanimous Sixth Circuit panel held that Himmelreich stated a viable claim based on Petitioners' deliberately indifferent failure to protect him from a "substantial risk of serious harm." Pet. App. 29a–31a.

Petitioners contend, however, that this *Bivens* action is wholly precluded as a threshold matter, based on the dismissal for lack of subject-matter jurisdiction of a negligence suit Himmelreich had previously filed against the United States. Urging a dramatically broader construction of the FTCA's judgment-bar provision, 28 U.S.C. § 2676, than any Court of Appeals has adopted in the nearly seventy years since its enactment, Petitioners argue that because a court found that Himmelreich was categorically unable to sue the Government for this harm, he is also precluded from suing the responsible officials personally, even though Congress expressly excepted *Bivens* actions from the scope of the FTCA's exclusive-remedy provision, *id.* § 2679(b). The Sixth Circuit rejected that expansive view. Pet. App. 5a–10a.

1. The FTCA was enacted as Title IV of the Legislative Reorganization Act of 1946, to provide a new remedy for individuals injured by the negligent or wrongful acts of federal employees acting within the scope of employment. Ch. 753, §§ 401–424, 60 Stat. 812, 842–47. The Act waives the Government's sovereign immunity, subject to certain exceptions, if a private person would face tort liability under state law. It "was the offspring of a feeling that the Government"—not the employees personally—"should assume the obligation to pay damages for the misfeasance of [its] employees." *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

Before the Act, someone injured by a federal employee could either sue that employee in tort or pursue a private bill seeking compensation in Congress. But personal-capacity tort suits represented "a very real attack upon the morale of the services." *United States v. Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting legislative history). And private bills—which were "notoriously clumsy," *Dalehite*, 346 U.S. at 24–25—were overwhelming Congress. The new FTCA therefore created an "easy and simple" judicial remedy against the Government directly. *Id.* at 25.

Three FTCA provisions are particularly relevant here. *First*, 28 U.S.C. § 1346(b) is the statute's jurisdictional provision, which also functions as the cause of action and waiver of sovereign immunity. It confers subject-matter jurisdiction on federal district courts, subject to the other provisions of the FTCA, over claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Second, "Congress qualified this general waiver of immunity in 28 U.S.C. § 2680 by excepting from the Act claims arising from certain government activity." *United States v. Muniz*, 374 U.S. 150, 153 (1963). That provision makes the FTCA as a whole inapplicable to certain categories of conduct; in the Code's language, the "provisions of this chapter and section 1346(b) of this title shall not apply to" a host of enumerated claims. The exceptions include claims based on the exercise of a "discretionary function," 28 U.S.C. § 2680(a); claims arising from loss or "negligent transmission" of "postal matter," *id.* § 2680(b); claims alleging certain intentional torts, *id.* § 2680(h); and ten other specified categories of claims. Because these are exceptions to the Act's waiver of sovereign immunity and to its jurisdictional grant in § 1346(b), courts have generally agreed with the Government's long-held position that the § 2680 carve-outs are jurisdictional in nature. *See, e.g.*, *Dalehite*, 346 U.S. at 24; Pet. 3–4 & n.2 (collecting cases).

Third, the FTCA contains a so-called "judgment bar," providing that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C § 2676. That provision, this Court explained in an early case, "makes a judgment against the United States a bar to action against the employee," *Gilman*, 347 U.S. at 511 n.2, so that no double recovery would be permitted, *see id.* (citing legislative history to effect that, once "the Government has satisfied a claim ... that should, in our judgment, be the end of it").

Finally, one more recent amendment to the FTCA bears mention. In 1988, Congress enacted the Westfall Act, which among other things makes the FTCA the "exclusive" remedy for any injury arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Claims against employees in their individual capacities, arising out of the "same subject matter," are thus expressly "precluded," even absent any prior judgment in an action against the Government. *Id.* However, Congress carved out claims for constitutional violations, *i.e.*, *Bivens* claims, from that exclusive-remedy provision. *Id.* § 2679(b)(2)(A); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting this *Bivens* exception).

2. At the time of the events at issue, Respondent Himmelreich was incarcerated at FCI Elkton, a federal prison in Ohio, serving a sentence for the production of child pornography. *See* Pet. 4. On October 16, 2008, another inmate, who was then being housed in the prison's Special Housing Unit as the result of a disciplinary violation, told prison officials that he was "not able to live with pedophiles" and that if he were released back to the general compound, he "will smash a pedophile." Decl. of Jason Streeval, Dkt. 31-2, ¶ 5, *Himmelreich v. United States*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010). Four days later, that inmate was nonetheless released back to the general prison population. *Id.* As promised, just hours later on that very same day, he approached Himmelreich, "punched him in the face and then kicked him numerous times." *Id.* Himmelreich suffered serious injuries as a result of this assault and battery.

a. In February 2009, Himmelreich filed an administrative tort claim with the Federal Bureau of Prisons, recounting how he was "severely beaten" by the other inmate, suffering "internal bruising," "external injuries," "permanent ringing in the ears," persistent headaches, and "a pinched nerve." Dkt. 1-1, at 3–5, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010). In August 2009, the Bureau's regional counsel denied the claim, on the basis that there was "no evidence to suggest your assailant ever told staff he was going to assault you or that staff had any prior knowledge you were going to be assaulted." *Id.* at 1. ***But see infra*** note 1.

Himmelreich then filed, in February 2010, a one-sentence complaint against the United States, styled as an "appeal" of the denial of his "administrative tort claim," attaching that claim and the letter denying it. Dkt. 1, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010). The civil cover sheet identified the case as a "civil rights" matter and did not cite the FTCA as the operative cause of action. Dkt. 1-2, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010).

The Government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), telling the district court that it "lack[ed] subject matter jurisdiction ..., because Plaintiff's claims fall within the discretionary function exception to the [FTCA]." Dkt. 31, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010). Its brief in support emphasized that, "[b]ecause Congress has not waived the sovereign immunity of the United States for claims that fall within the discretionary function exception, federal courts lack subject matter jurisdiction over such claims." Dkt. 31-1, at 5, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010); *accord id.* at 1, 12.

In the Government's view, Himmelreich's claim fell within the FTCA's discretionary-function exception because prison officials exercise discretion and judgment when they determine how to house and protect inmates. *See id.* at 6–9.[1]

On November 18, 2010, the district court granted the motion to dismiss. Pet. App. 47a. The court noted that Himmelreich's complaint was styled as an appeal from denial of an administrative tort claim, and "[a]ccordingly, he seeks relief under the [FTCA]." Pet. App. 47a–48a. But the court agreed with the Government that it "lacks subject matter jurisdiction over acts falling within the discretionary function exception" to the FTCA, 28 U.S.C. § 2680(a), and then concluded that Himmelreich's claims did fall within the scope of that statutory carve-out. Pet. App. 49a–53a. The court therefore granted the motion and dismissed the suit. *Id.* at 55a.

b. On October 21, 2010—after the Government moved to dismiss Himmelreich's first action, but before the court granted that motion—Himmelreich filed a separate, second action in the same court. This second complaint was styled as a "complaint under *Bivens*"; it alleged that the defendants, including Petitioners sued in their personal capacities, knew about the intended assault and had violated Himmelreich's Eighth Amendment rights by failing to protect him from it. Compl. at 1, D. Ct. Dkt. 1. The complaint also alleged that other defendants had retaliated against him for the filing of his original tort claim. *See id.* at 15, ¶ 66.

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[1] Notwithstanding the Bureau's earlier statement that there was "no evidence" that prison staff knew about the threatened assault in advance, the declaration filed in support of the Government's motion to dismiss admitted that the assailant had told prison officials of his intent to "smash" a pedophile four days before he carried out that threat. *See* Dkt. 31-2, ¶ 5, *Himmelreich*, No. 4:10-cv-307 (N.D. Ohio Oct. 13, 2010).

The district court initially dismissed the *Bivens* suit *sua sponte* under 28 U.S.C. § 1915(e). *See* Pet. App. 34a, 38a. As to the Eighth Amendment claim, the court reasoned that Himmelreich had not alleged that "the prison officials acted with a sufficiently culpable state of mind," only that they were "negligent." *Id.* at 41a–44a. On appeal, however, the Sixth Circuit vacated and remanded in relevant part. *See id.* at 23a–24a. The panel explained that Himmelreich had alleged sufficient facts to show that the prison officers were aware of a "substantial risk" to Himmelreich or to a "class of prisoners" including him, and "disregarded that risk by releasing [the other inmate] back into the general population." *Id.* at 30a–31a. The court also concluded that Himmelreich's complaint, construed liberally, "pled the three elements of a First Amendment retaliation claim" based on events that followed the filing of his administrative tort claim. *Id.* at 29a.

On remand, the district court again dismissed both the Eighth Amendment and First Amendment claims, this time on summary judgment. *See* Pet. App. 13a. *First*, the court found both claims barred under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), because Himmelreich had not exhausted administrative remedies within the Bureau of Prisons. Pet. App. 16a–20a. *Second*, the court held that the FTCA judgment bar precluded the Eighth Amendment clair Because that claim arose from the same assault and failure to protect as his earlier tort suit against the United States, which was dismissed "because the actions in controversy fell under the discretionary[-function] exception to the FTCA," the cour concluded that 28 U.S.C. § 2676 "bars any further action." Pet. App. 21a.

3. Proceeding *pro se*, Himmelreich appealed the district court's final order, and the Sixth Circuit again unanimously vacated and remanded, rejecting both of the district court's grounds. *See* Pet. App. 1a–2a.

As to PLRA exhaustion, the panel invoked the exception for when an official's threats to retaliate make administrative remedies "functionally unavailable." Pet. App. 3a–4a. Because Himmelreich alleged that one defendant had placed him in administrative detention for filing his tort claim and threatened to transfer him if he continued to file grievances, a jury could find that Himmelreich was "improperly prevented" from exhausting administrative remedies. Pet. App. 4a.

Turning to the FTCA judgment bar, the panel reasoned that "dismissal for lack of subject-matter jurisdiction does not trigger" the statutory bar. Pet. App. 6a. "Put bluntly," if a court lacks subject-matter jurisdiction, it cannot enter judgment "on the merits" and must dismiss the action; that is not a "judgment" within the meaning of § 2676. *Id.* (quoting 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3713 (3d ed. 1998)). And, under Sixth Circuit precedent the parties did not dispute, "courts lack subject-matter jurisdiction over an FTCA claim when the discretionary-function exception applies, as it did here." *Id.* at 6a–7a. Hence the dismissal of Himmelreich's tort claim against the Government did not trigger the judgment bar. *See id.* Correcting the district court, the Court of Appeals clarified that its decision in *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), had not addressed this issue; rather, it held only that the judgment bar is triggered even by a judgment "on the merits" *in favor of* the United States. Pet. App. 7a.

The panel also noted that, while the district court relied on Seventh Circuit caselaw, the Seventh Circuit had actually declined to address the question whether a dismissal for lack of subject-matter jurisdiction triggers the judgment bar. Pet. App. 9a (citing *Williams v. Fleming*, 597 F.3d 820, 822 n.2 (7th Cir. 2010)). That issue is far less relevant in the Seventh Circuit because that court, contrary to every other Circuit, "treats the dismissal of an FTCA action due to the application of the discretionary-function exception as a decision on the merits." *Id.* (citing *Collins v. United States*, 564 F.3d 833, 837–38 (7th Cir. 2009)). In other words, the panel's disagreement with the Seventh Circuit was not over the scope of § 2676, but rather over the nature of dismissals under § 2680. That distinct issue was not disputed by any of the parties here; all *agreed* that § 2680 is jurisdictional.

Petitioners filed a petition for rehearing en banc, which the Court of Appeals denied without calling for a response, and with no judge requesting a vote. Pet. App. 11a–12a. Petitioners did not move for a stay of the appellate mandate, which issued on March 28, 2015. Since that date, proceedings have resumed in the district court on the remanded claims. *See* D. Ct. Dkts. 69, 71, 72, 73, 74.[3]

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[3] The petition asserts that the dismissal of Himmelreich's claims against Defendants Newland and Bunts was affirmed on the first appeal, and that these defendants therefore are no longer parties to the action and are not participating as Petitioners. *See* Pet. II n.1. Respondent disputes that reading of the opinions below. Notably, unlike several original defendants who are no longer parties to the action, Newland and Bunts are not identified as "terminated" parties on the district court's docket; to the contrary, the district court held, with no objection by the Government, that they remained parties on remand, *see* D. Ct. Dkt. 20 (order "not[ing] that based upon the Sixth Circuit's opinion, only a limited number of Defendants"—including "Ms. Bunts, and Ms. Newland"—"remain in this matter"). In any event, Respondent accepts that neither Newland nor Bunts is proceeding as a petitioner in this Court.

REASONS FOR DENYING THE PETITION

The petition does not satisfy any of this Court's traditional criteria for certiorar and there are good reasons not to grant further review of the decision below.

First, the 2-1 Circuit conflict that Petitioners allege is at best overstated, and at worst non-existent. No Court of Appeals has ever embraced the construction of the judgment bar that Petitioners urge here, and the Sixth Circuit's construction is—at most—in tension with a Ninth Circuit *concurrence* (albeit one that the Ninth Circuit panel confusingly suggested it agreed with). While this Court granted certiorari in *Will v. Hallock*, that case involved a *second* question, about appellate jurisdiction, as to which the Circuits truly *were* divided (and which the Court then resolved).

Second, the issue does not arise often. Only three Circuits are even *alleged* to have weighed in during the nearly seventy years since the law's enactment, with the court below being the first new Circuit to do so since *Will v. Hallock* was granted more than ten years ago. And the judgment bar has diminished in importance since the passage of the Westfall Act in 1988, as federal employees are now completely immunized from most claims, even apart from the judgment bar. The bar matters mainly for *Bivens* claims, which were exempted from the Westfall Act due to their constitutional magnitude, and which rarely succeed in any event.

Third, and relatedly, further percolation is warranted. Given the paltry appellate precedent on point, some of the critical issues surrounding the scope of § 2676—including an argument addressed at oral argument in *Will*—have *never* been considered by *any* court. This Court should not be the first to confront them.

Fourth, even if this Court were inclined to resolve the question presented, this is not a strong vehicle. The petition is interlocutory, which means the judgment bar may not affect the outcome of the case (which has already resumed in the district court and may well be the subject of further dispositive motions). And because Respondent acted *pro se* below, the issues have not necessarily been fully explored.

Fifth, and finally, although the petition is largely devoted to claiming that the court below erred in construing § 2676—which, in any event, is not itself a basis for this Court's review—Petitioners are wrong. Their novel, broad view of the statute ignores critical provisions in its text; overlooks its historical context; undermines its core purposes; and implies absurd results. That is why no Circuit has ever adopted it, and why even Petitioners offer an unprincipled fallback position that belies their aggressive claims about the statute's supposedly "plain" meaning.

I. THERE IS NO GENUINE DISAGREEMENT AMONG THE CIRCUITS OVER THE QUESTION PRESENTED BY THE PETITION

Petitioners do not even allege a Circuit conflict until the final five pages of their petition. Pet. 21–24. There is a reason for that. No Circuit has adopted their legal rule that *any* dismissal of an FTCA claim, whether or not "on the merits," constitutes a "judgment" under § 2676. The Seventh Circuit does disagree with its sister courts—but on a *distinct* issue, as to which Petitioners *agree* with the decision below. That is no basis to grant a petition seeking *reversal* of the decision below. As for the Ninth Circuit, its most recent opinion on § 2676 is so confused that it has been cited as having taken *both sides* of the question presented. In short, there is no genuine, developed Circuit disagreement over the only true legal dispute here.

A. At the outset, Petitioners emphasize that this Court granted review of the same question in *Will v. Hallock*. Pet. 2. But that case also presented a *second* question, as to which there was an undeniable split—namely, whether refusal to dismiss a *Bivens* action under the FTCA judgment bar could be appealed on an interlocutory basis. The Second Circuit had said yes, *Hallock v. Bonner*, 387 F.3d 147, 152–54 (2d Cir. 2004), joining the Tenth Circuit, *Farmer v. Perrill*, 275 F.3d 958, 961 (10th Cir. 2001), but the Third Circuit had ruled otherwise, *Brown v. United States*, 851 F.2d 615, 619 (3d Cir. 1988). The Second Circuit acknowledged that conflict in its opinion. *Hallock*, 387 F.3d at 154. In the certiorari petition, the Solicitor General admitted that this question of jurisdiction "warrants resolution by this Court." Pet. for Cert. at 5 n.2, *Will v. Hallock*, 546 U.S. 345 (2006) (No. 04-1332). Indeed, that question was self-evidently *more* important than the scope of the judgment bar, since it has force in *every* case where a district court allows a *Bivens* suit to proceed over FTCA judgment-bar objections. The Court affirmatively ordered this other question added to its review. *See* 545 U.S. 1103 (2005). And, in the end, that was the only question that the Court reached. *Will*, 546 U.S. 345.

Indeed, that jurisdictional question is likely what induced this Court to grant review in *Will*, because the Circuits were *not* actually divided over the scope of the judgment bar. The *Will* petition alleged a conflict with the Seventh and Ninth Circuits, but neither had addressed the issue. Rather, those courts had confronted a distinct question: whether the judgment bar is triggered by an FTCA judgment *in favor of* the Government, where there is no concern of double recovery.

Thus, in *Hoosier Bancorp v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996), the plaintiffs "argue[d] that Section 2676 should only be applied to prevent double recoveries," and therefore did not apply to bar their claim "because they recovered nothing in their FTCA case." *Id.* at 184. The court rejected that contention: "There is no indication that Congress intended Section 2676 to apply only to favorable FTCA judgments." *Id.* at 185. And the Seventh Circuit subsequently confirmed that the *only* issue in *Hoosier* was "whether a judgment must have been favorable for application of the judgment bar," not "whether a judgment under the FTCA must be 'on the merits' for the judgment bar to apply." *Williams*, 597 F.3d at 823.

Likewise, the Ninth Circuit in *Gasho v. United States* confronted the same theory: that § 2676 "applies only to judgments *against* the United States," so as to "prevent more than one satisfaction of a claim." 39 F.3d 1420, 1437 (9th Cir. 1994) (emphasis added). That court too rejected the argument, finding in the statute no such distinction. *Id.* The *Gasho* plaintiffs also argued that dismissal of their "abuse of process" FTCA claim for failure to state a claim was not a judgment "on the merits." *Id.* at 1438 n.17. In a footnote, the court responded that Rule 12(b)(6) dismissals are "on the merits" *because* they are final for purposes of *res judicata*—thus, if anything, *accepting* that § 2676 is triggered only by merits judgments with claim-preclusive effect. *See id.*[3]

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[3] As an alternative holding, the Ninth Circuit said that the FTCA claim was also barred by a § 2680 exception, but neither noted that § 2680 dismissals are jurisdictional nor resolved whether § 2676 applies to dismissals for lack of jurisdiction. *See Gasho*, 39 F.3d at1438 n.17. The *Gasho* plaintiffs do not appear to have raised that issue. *See id.* at 1437.

For these reasons, this Court's grant of review in *Will* was evidently driven by the clear split over the jurisdictional issue, not the illusory conflict over the scope of § 2676. The grant in *Will* therefore does not warrant review here, particularly given that the alleged Circuit conflict on the § 2676 question has developed barely, if at all, during the intervening years. *See infra* Parts I.B, I.C & II.A.

B. As in *Will*, Petitioners here claim a conflict with the Seventh Circuit. Pet. 22–23. But, despite one new case in that Circuit since *Will*, there is no conflict between that court and the decision below over the only legal issue in dispute.

Subtly but importantly, the petition conflates two distinct issues: (i) whether the FTCA judgment bar is triggered even by dismissals for lack of subject-matter jurisdiction; and (ii) whether the FTCA's carve-outs in § 2680 are jurisdictional. The first question calls for construction of § 2676; the second for construction of § 2680. And *both* questions matter. For example, the question whether § 2680 is jurisdictional controls whether that section can be waived, which has nothing to do with the judgment bar. *See, e.g.*, *Bolduc v. United States*, 402 F.3d 50, 54, 60–62 (1st Cir. 2005) (addressing "belated" invocation of discretionary-function exception, because jurisdiction "not waivable"). Conversely, the question whether § 2676 is triggered by jurisdictional dismissals bears on *other* jurisdictional dismissals, wholly apart from § 2680. *See, e.g.*, *id.* at 56–59 (dismissing FTCA claim for lack of subject-matter jurisdiction due to issue unrelated to § 2680 exceptions).

The Seventh Circuit has directly addressed only the second of these issues, holding that the § 2680 exceptions are affirmative defenses that do not affect a

court's jurisdiction. *See Collins*, 564 F.3d at 837–38; *Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008) ("The statutory exceptions enumerated in § 2680(a)–(n) ... limit the breadth of the Government's waiver of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction ....").

It follows from that premise that, even on the Sixth Circuit's view of § 2676, dismissals under § 2680 are "on the merits," entitled to *res judicata* effect, and thus do trigger the judgment bar. The Seventh Circuit so clarified in *Williams*: Because "the exceptions contained in § 2680 are mandatory rules of decision rather than restrictions on a court's subject matter jurisdiction," dismissal under that section is "on the merits," triggering § 2676 *regardless* of "whether a judgment under the FTCA must be 'on the merits' for the judgment bar to apply." 597 F.3d at 823–24. As such, the Circuit expressly declined to resolve the latter issue. *See id.* at 823.

The Sixth Circuit, by contrast, holds—like every court aside from the Seventh Circuit—that the § 2680 exceptions are jurisdictional in nature. *See Kohl v. United States*, 699 F.3d 935, 939–40 (6th Cir. 2012); *Milligan v. United States*, 670 F.3d 686, 695 (6th Cir. 2012). As such, it was required in the decision below to answer the question that *Williams* did not address: Do jurisdictional dismissals trigger § 2676? And the court below held that they do not. *See* Pet. App. 6a–7a.

In other words, there is no conflict between the Sixth and Seventh Circuits over the legal issue resolved below—*i.e.*, whether § 2676 applies to jurisdictional dismissals—because the Seventh Circuit has never answered that question. There *is* a conflict—between the Seventh Circuit and every other court—over whether

§ 2680's exceptions to FTCA liability are jurisdictional. But that is *not* the question Petitioners want this Court to review. To the contrary, they *agree* with the Sixth Circuit on that point. It is the Government's longstanding, firmly held position that § 2680's exceptions are jurisdictional (and so cannot be waived). *See Collins*, 564 F.3d at 837 (Government contended, "with some vehemence at the oral argument, that it is an issue of jurisdictional moment"); *supra* pp. 5–6 (Government sought dismissal of Himmelreich's FTCA claim under Rule 12(b)(1) on ground that court lacked jurisdiction because claim fell within § 2680 exception). The Government may seek certiorari from an adverse Seventh Circuit decision rejecting its view on that issue, but Petitioners can hardly point to those decisions as justifying this Court's review of a Sixth Circuit decision that *adopts* their "jurisdictional" stance.

Put another way, if this Court grants certiorari, Respondent Himmelreich will contend that § 2680's exceptions are jurisdictional and that § 2676 therefore is not triggered by a dismissal under those exceptions. Petitioners will *agree* that the § 2680 exceptions are jurisdictional, but claim that § 2676 applies to *all* judgments, even jurisdictional dismissals. *See* Pet. 9–12. They will also argue that dismissals under § 2680, while jurisdictional in nature, are not "merely jurisdictional," and are sufficiently "substantive" to trigger the judgment bar. *See id.* at 13–17. But they will *not* argue that § 2680 creates affirmative defenses, as opposed to jurisdictional limits. No party will urge the Seventh Circuit's outlier view. The Seventh Circuit's disagreement with the decision below over the nature of § 2680 is therefore no reason to hear a dispute over the proper construction of § 2676.

C. The only other court that Petitioners allege to be part of the Circuit conflict is the Ninth Circuit, again relying on a new decision since the *Will* petition, *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008). But the Ninth Circuit's position is far from clear. *Pesnell*'s tortured history, including three panel opinions and two en banc petitions, resulted in a final opinion that can only be described as confused.

In the initial *Pesnell* panel opinion, authored by Judge Hug and joined by Judge Pregerson, the court held—much like the Sixth Circuit below—that "the FTCA claims were dismissed for lack of jurisdiction and that the subsequent claims against the federal employees are not barred." 490 F.3d 1158, 1160 (9th Cir. 2007). Its analysis of the judgment bar noted that the parties—including the defendants represented by the U.S. Attorney's Office—"agree" that "for the judgment bar rule to apply the judgment *must be on the merits, not based on lack of jurisdiction*." *Id.* at 1161 (emphasis added). "The parties are correct." *Id.* "Because we conclude that the judgment in [the FTCA action] was based on lack of jurisdiction, the FTCA's judgment bar rule does not preclude Pesnell from bringing his current *Bivens* and RICO claims arising out of the same subject matter." *Id.* In partial dissent, Judge Clifton argued that "[n]ot all dismissals for lack of jurisdiction should be treated alike." *Id.* at 1171 (Clifton, J., concurring in part and dissenting in part). He took the view that dismissals based on *exceptions* to FTCA liability, like under § 2680, "constitute judgments for § 2676," whereas dismissals for "failure to conform to the conditions placed on an existent waiver of sovereign immunity," such as for failure to exhaust or based on statutes of limitations, "do not" trigger the judgment bar. *Id.*

The defendants then filed a rehearing petition. The Ninth Circuit denied the petition, but the panel issued an amended opinion and withdrew the original one. *See* 531 F.3d 993, 995 (9th Cir. 2008). The amended opinion, still written by Judge Hug and joined by Judge Pregerson, again reversed and remanded, but on different grounds. This time, it ruled that the plaintiff's *Bivens* claims "are not foreclosed by the statutory bar of § 2676 because those claims could not have been brought under [the FTCA]," which creates a remedy for state-law tort claims but not constitutional torts. *Id.* at 996. Nor were his RICO claims barred, because they too could not have been "brought in the FTCA action," with the caveat that the plaintiff could not rely "on the same allegations of misrepresentation" involved in the FTCA suit. *Id.* at 997. At the same time, however, the panel noted that the "concurring opinion," by Judge Clifton, "analyzes in greater detail the application of the judgment bar rule," and said: "We agree with the concurring opinion." *Id.* The concurrence repeated Judge Clifton's original partial dissent, again pressing the novel distinction between jurisdictional dismissals due to "permanent problem[s]" and those based on "failure to conform to the [required] conditions." *Id.* at 1001 (Clifton, J.).

Yet again, the Justice Department filed a rehearing petition, this time asking for the panel "to clarify confusing language" in the amended opinion, specifically its statement that the *Bivens* claims were not barred because they were not cognizable under the FTCA. *See* Pet. at 1, *Pesnell*, 531 F.3d 993 (No. 04-56721), Dkt. 35. The panel did not change that language, but amended its opinion again to add a footnote further cross-referencing the concurrence. 543 F.3d at 1040, 1041 n.3.

The bottom line is thus the following: None of the *Pesnell* judges accepted Petitioners' broad theory here, that *any* FTCA dismissal constitutes a "judgment" for purposes of § 2676. Even Judge Clifton agreed that some such dismissals do not. *See* 543 F.3d at 1046 (Clifton, J., concurring). As for the panel itself, its views are obscure. On one hand, it did state its agreement with the concurrence. *Id.* at 1042. But for whatever reason, the panel declined to directly state the concurrence's rule in its own opinion. *See id.* And, on the other hand, it seemed to suggest that *Bivens* actions are *never* barred by § 2676, because they are not cognizable under the FTCA, which is an even more plaintiff-friendly rule than the decision below. *Id.* at 1041.

Given these conflicting signals, it is no surprise that lower courts have cited *Pesnell* as taking *both sides* of the question presented here. *Compare Donahue v. Connolly*, 890 F. Supp. 2d 173, 184 (D. Mass. 2012) ("[i]n [*Pesnell*], the Ninth Circuit held that the FTCA judgment bar did not bar *Bivens* actions where the FTCA action was dismissed for lack of jurisdiction"), *and Williams v. FDIC*, No. 07-C-4672, 2009 WL 1209029, at *2 (N.D. Ill. Apr. 30, 2009) (citing *Pesnell* as holding that § 2676 "did not bar constitutional claims dismissed for lack of jurisdiction under the FTCA"), *with Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1150 (E.D. Cal. 2010) ("the Ninth Circuit has interpreted the FTCA's judgment bar to preclude *Bivens* claims where a dismissal of a previous FTCA claim was upheld based on lack of subject matter jurisdiction"). The messy and ambiguous *Pesnell* decisions are manifestly in need of further clarification by the Ninth Circuit. This is thin ground on which to base an alleged Circuit split.

II. THE QUESTION PRESENTED HERE IS NOT IMPORTANT OR RECURRING ENOUGH TO WARRANT THIS COURT'S ATTENTION

The opinion below reflects the first new Court of Appeals to address the question presented since *Will* was granted over ten years ago—and only the third to do so since the FTCA judgment bar was enacted in 1946. That lack of doctrinal development is strong indication that this issue is simply not as important or oft-recurring as Petitioners claim, and does not warrant this Court's attention. If anything, since the Westfall Act rendered the FTCA the *exclusive* remedy for most claims based on acts of federal employees, the preclusive effect of FTCA judgments has become far less consequential (because most other remedies are *wholly barred*).

A. The Petitioners in *Will* alleged—incorrectly, *see supra* Part I.A—that the Second Circuit's decision there conflicted with decisions of the Seventh and Ninth Circuits. *See* Pet. for Cert. at 14–15, *Will*, 546 U.S. 345 (No. 04-1332). Petitioners here allege a conflict with the *same* two Circuits (and again overstate the conflict and gloss over important distinctions in those courts' decisions). *See* Pet. 21–24. In other words, the Sixth Circuit is the first new Court of Appeals to address this issue *in a decade*. The Second Circuit, for its part, has not revisited the question since its *Hallock* opinion was vacated on other grounds by this Court, a further indication of the limited practical significance of the issue.

Further, there are only three Courts of Appeals in total—four if you count the vacated decision in *Hallock*—that are even *alleged* to have spoken to the question presented. (And as noted, the Seventh Circuit has not actually done so, and the Ninth Circuit's treatment was largely by a concurring judge.) That scarcity of

appellate precedent is striking, given that the disputed statutory language was part of the original FTCA as originally enacted nearly seventy years ago. *See* Legislative Reorganization Act of 1946, ch. 753, § 410(b), 60 Stat. 812, 844 (1946). This issue, evidently, does not frequently arise or practically matter.

B. Moreover, the question presented has only become *less* important over time. When the FTCA was originally enacted, the typical course for those injured by federal employees was to sue the employees personally on state tort-law theories. *E.g.*, *Brann v. McBurnett*, 29 F. Supp. 188 (E.D. Ark. 1939) (negligence claim against federal deputy marshals based on car accident); *Jones v. McGill*, 46 F.2d 334 (D.N.H. 1931) (negligence claim against federal prison official based on injuries sustained by prisoner); *Wynn v. Baker*, 23 F.2d 530 (M.D. Ala. 1927) (tort claim against federal prohibition agent based on injuries sustained in course of raid). While these suits could be removed by the defendant employee to federal court, *see* 28 U.S.C. § 1442, they were not foreclosed by federal law. As this Court reiterated in *Westfall v. Erwin*, 484 U.S. 292 (1988), no categorical absolute immunity shields those employees or officials from state tort liability. *See id.* at 295–300. The FTCA's judgment bar therefore served an important function, by foreclosing these state-law tort actions in cases where the plaintiff had already recovered from the United States itself or failed to prove his case in such an action.

Congress, however, swiftly responded to the *Westfall* decision by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, which is "commonly known as the Westfall Act." *Osborn v. Haley*, 549 U.S. 225, 229 (2007).

That Act, which was codified in the same portions of the U.S. Code as the FTCA, "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn*, 549 U.S. at 229. Subject to only two narrow exceptions, the Act makes "exclusive" the FTCA's remedy against the United States for the wrongful or negligent acts of its employees acting within the scope of their employment, and "preclude[s]" any other damages action against the federal employee personally. 28 U.S.C. § 2679(b)(1).

Thus, the vast majority of tort claims against federal employees are, by virtue of the Westfall Act, *entirely precluded*—even if the plaintiff does not first sue the United States and reach judgment in that action. As to all those claims, the FTCA judgment bar is now redundant due to the broader preclusion under the Westfall Act. The *sole* remaining function of § 2676 is thus with respect to the two categories of claims exempted from the Westfall Act's exclusive-remedy provision—namely, claims "for a violation of the Constitution" and claims for violation of a federal statute under which an action against the employee personally is "authorized." *Id.* § 2679(b)(2). The answer to the question presented therefore matters mainly for *Bivens* suits pursued after jurisdictional dismissal of FTCA claims arising from the same conduct. *See Hui*, 559 U.S. at 810 (noting Westfall Act's *Bivens* exception).

That is a very narrow set of cases. And it is a set of cases that, even apart from the FTCA judgment bar, faces a series of difficult threshold hurdles. Among other things, defendants in *Bivens* actions are entitled to the qualified immunity defense, *see Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982), and the courts are very

hesitant to recognize *Bivens* actions at all beyond the limited contexts in which this Court has already done so, *see Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012). As a practical matter, accordingly, the FTCA judgment bar is simply not very important.[4]

C. The Westfall Act is also illustrative in another respect. After Congress enacted it in 1988, a debate arose over whether the new exclusive-remedy provision bars claims against employees for conduct that could not support an FTCA action because of the exceptions in § 2680. That is, if a claim falls within one of the § 2680 exceptions and thus outside the FTCA, is a claim against the employee himself still "precluded" under § 2679(b)(1)? Or may such a claim be pursued given that there is no FTCA remedy otherwise available? Within just *three years* of the Westfall Act's enactment, this Court granted certiorari to resolve a 3-2 conflict among the Circuits over that question. *United States v. Smith*, 499 U.S. 160, 165 & n.7 (1991).

In other words, *five* Circuits squarely addressed and resolved the issue in the few years immediately following the statute's enactment. That is strong evidence of an important, recurring question. The contrast to this petition—which presents, *at best*, a 2-1 split nearly seven decades after the FTCA's enactment—is telling.

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[4] Petitioners emphasize that *Bivens* suits threaten "[p]ersonal [l]iability" for federal officers and employees and are therefore especially worthy of this Court's attention. Pet. 24. But, as this case illustrates, federal employees—while named in their personal capacities—are typically represented in litigation by the Justice Department. And, "[i]n cases in which the United States has provided representation to the individual defendant, it has *not once* failed to reimburse a federal employee for the costs of a *Bivens* settlement or judgment." Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L. J. 65, 78 n.61 (1999) (emphasis added).

III. AT MINIMUM, FURTHER PERCOLATION IS WARRANTED SO AS TO FURTHER DEVELOP THE COMPETING ARGUMENTS

Even apart from what it signifies about the importance of the question, the relative sparseness of on-point appellate caselaw counsels against granting this petition. To the extent that review would ever be warranted, it is still premature. Further percolation would be prudent.

There are not more than a handful of Circuit opinions, at most, grappling with the arguments on both sides of the issue here. The decision below, Judge Clifton's concurrence in *Pesnell*, and the vacated Second Circuit decision in *Hallock* are the only three that include any sustained analysis—and even they are fairly cursory. As a result, a number of significant arguments and angles have *never* been raised, much less addressed, by any Court of Appeals. If this Court were to grant the petition, however, Respondent would be free to raise any argument in favor of the judgment below. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."). This Court would therefore undoubtedly be confronted by arguments that have not been developed *at all* in the caselaw. Yet this is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

For example, at oral argument in *Will v. Hallock*, Justice Stevens raised a point that had not been directly argued by the respondent in that case. He observed that, under § 2680, the provisions of the FTCA "*shall not apply*" to claims falling within its enumerated exceptions. *See* 28 U.S.C. § 2680 ("The provisions of this

chapter and section 1346(b) of this title shall not apply to ...."). Then why, Justice Stevens asked, would the FTCA judgment-bar provision, § 2676—which falls within the "chapter" referenced in § 2680—apply at all to claims embraced by § 2680? *See* Tr. of Oral Arg. at 11–12, *Will*, 546 U.S. 345 (No. 04-1332). Counsel and the Justices engaged with that issue at some length. *Id.* at 11–15; *id.* at 21 ("JUSTICE STEVENS: I'd like to pursue the question I asked you earlier because I really didn't fully understand your answer."); *id.* at 37 ("CHIEF JUSTICE ROBERTS: Did you—did you make the argument or the point that Justice Stevens articulated earlier about the—the provisions of this chapter not applying and that including 2676?"); *see also id.* at 22–24, 37–42 (further discussion of this argument).

Over the decade since *Will*, however, no court appears to have considered or addressed Justice Stevens' question—and Petitioners just ignore it. Himmelreich intends to press this argument if the Court grants certiorari, *see infra* Part V.A, but the Court would then be required to resolve the proper reading of § 2680's "shall not apply" language, and how it interacts with § 2676, absent any development by any lower courts, much less Courts of Appeals. That is not the way that complex statutory-construction disputes ought to be presented to this Court.

Similarly, academics have exhaustively researched the history of the FTCA and concluded, among other things, that the judgment bar does not apply to *Bivens* claims *at all*—only to state tort claims identical to those that could be filed against the United States, under the FTCA, on a vicarious-liability theory. *See generally* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of*

Dynamic Textualism, 8 U. St. Thomas L.J. 417 (2011). Yet that theory, too—while reminiscent of the Ninth Circuit's statement in *Pesnell* that the plaintiffs' *Bivens* claims were "not foreclosed by the statutory bar of § 2676 because those claims could not have been brought under [the FTCA]," 543 F.3d at 1042—has never been aired in the federal courts. Again, this Court should not be the first to consider it.

If this issue is as frequently recurring as Petitioners claim, other parties will raise these arguments in future cases; the courts will weigh in; and the issue will be better primed for this Court's review. Further percolation is thus appropriate, and granting certiorari here would be both premature and imprudent.

IV. THIS CASE IS A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED

For two reasons, this case is not a strong vehicle through which to resolve the question presented, even if the issue were otherwise worthy of this Court's attention. *First*, because of the interlocutory posture of the case, it is entirely possible that the scope of the judgment bar will be irrelevant to the ultimate disposition of the claims. *Second*, because Himmelreich represented himself in both the district court and the Sixth Circuit, the petition presents higher risks of vehicle problems than one arising from litigation in which counsel has fully and consistently participated.

A. While the district court entered a final judgment against Himmelreich, the Sixth Circuit reversed and remanded for further proceedings on both the First Amendment claim (which is unaffected by the judgment-bar issue) and the Eighth Amendment claim (which is implicated by that dispute). *See* Pet. App. 2a, 5a–6a. This petition is therefore interlocutory. And, because Petitioners did not seek to

stay the Sixth Circuit's mandate pending disposition of their petition, proceedings in the district court have already resumed. *See* D. Ct. Dkts. 69, 71, 72, 73, 74.

It is thus far from clear that the question presented, concerning the scope of the judgment bar, will have any actual effect on any final judgment. Petitioners may well prevail on other grounds either before or after a trial. On the other hand, if Himmelreich is able to obtain judgment in his favor on the Eighth Amendment *Bivens* claims, Petitioners would be free to seek this Court's review of the § 2676 issue at that juncture, on appeal from that final judgment. But there is no need to enter the fray at this early stage, when it remains unclear whether the scope of § 2676 even matters. *Cf. Will*, 546 U.S. at 355 (judgment bar does not "protect values so great that only immediate appeal can effectively vindicate them").

B. The other vehicle concern is that Himmelreich represented himself, while incarcerated, in both lower courts (and in the predecessor case). *See* Pet. App. 2a, 23a, 34a, 62a. While he prevailed on appeal despite the lack of professional counsel and with limited access to research materials and other resources, the undeniable consequence of his *pro se* representation is that his arguments were not as fully developed as they might have been. More troubling is the fear that, because no counsel was involved until very recently, there is a heightened risk of unknown vehicle issues or other potential barriers to reaching the issue presented.

The point bears repeating: If this issue recurs as frequently as Petitioners claim, there is no need to take a case suffering from these vehicle deficiencies.

V. THE OPINION BELOW IS CORRECT ON THE MERITS

Ignoring all the above, Petitioners lead—and spend most of their petition—arguing the merits of the question presented. This Court does not, of course, sit to correct errors. In any event, the Sixth Circuit did not err. It is Petitioners' position that is truly untenable—which is why *no Court of Appeals* has adopted it. The text, history, and purposes of the FTCA all confirm that mere jurisdictional dismissals, including dismissals under § 2680, do not trigger the judgment bar.

A. The Judgment Bar Is Inapplicable to Claims Within the FTCA Exceptions, Because the FTCA "Shall Not Apply" to Them

At the threshold, regardless of whether the judgment bar is triggered even by jurisdictional dismissals that lack any preclusive effect, that bar is independently inapplicable to dismissals under § 2680 for an entirely different reason.

1. As Justice Stevens suggested in *Will*, § 2680's plain text precludes application of the judgment bar based on FTCA actions that fall within its scope. Section 2680 is entitled: "Exceptions." It provides that "[t]he provisions of this chapter and section 1346(b) of this title *shall not apply to*" over a dozen enumerated types of claims that are exempt from operation of the FTCA. 28 U.S.C. § 2680 (emphasis added). The "chapter" to which § 2680 refers spans from § 2671 through § 2680—and includes § 2676, the judgment bar. Thus, due to § 2680, the judgment bar "shall not apply to" any claim within the discretionary-function exception, § 2680(a). And "shall" reflects "language of command." *Anderson v. Yungkau*, 392 U.S. 482, 485 (1947). Himmelreich's original claim against the United States fell within that exception (Pet. App. 48a–53a); the judgment-bar provision thus does

"not apply" with respect to that claim, and dismissal of that claim cannot trigger it.

Thus, while Petitioners repeatedly claim to champion the "plain meaning" and "plain text" of the FTCA judgment bar's "simple" words (Pet. 9, 10, 11, 12, 17), the equally simple words of § 2680 plainly foreclose Petitioners' reliance on § 2676 in the first place. Congress could have written § 2680 more narrowly—for example, by providing that there shall be no *liability* for the enumerated claims, or no *jurisdiction* over actions asserting them. But Congress wrote broadly, providing that the FTCA *as a whole* "shall not apply" to these types of claims. On its face, that language sweeps in the judgment-bar provision—and always has. *Accord* Tr. of Oral Arg. at 15, *Will*, 546 U.S. 345 (No. 04-1332) (Justice Breyer agreeing, as to this point, that "the language does seem to say it"). And, as Petitioners correctly note, "where the statutory language provides a clear answer," that is the end of the matter. Pet. 12 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

Nor is it remotely surprising that Congress would construct the scheme this way: If the claims listed in § 2680 cannot result in liability against the Government, then an action asserting such a claim should not preclude a later effort to sue the *correct* defendant—namely, the federal employee himself. Indeed, if anything, it is Petitioners' broad reading of § 2676 that would lead to bizarre or absurd results without any evidence that Congress so intended. *See infra* Part V.C.

2. Petitioners do not even acknowledge this argument, much less address it, even though it was discussed at some length during the *Will* oral argument. The Government attorney in *Will* did offer a response, but it is utterly unpersuasive.

In *Will*, the Government lawyer's exclusive rebuttal to § 2680's "shall not apply" language is that those words cannot mean what they literally say. *See* Tr. of Oral Arg. at 12–15, *Will*, 546 U.S. 345 (No. 04-1332). If they did, he asserted, this Court's decision in *Smith*, 499 U.S. 160, would have been wrong. *See id.* In *Smith*, this Court held that the exclusive-remedy provision enacted by the Westfall Act and codified at 28 U.S.C. § 2679(b) applies even to claims that fall within the § 2680 exceptions. If the rest of the FTCA really did "not apply" to claims within § 2680's scope, argued the Government lawyer in *Will*, then the exclusive-remedy provision in § 2679(b) should not apply—which would mean, contrary to *Smith*, that state-law remedies would remain available for claims excepted by § 2680. *See id.*

The flaw in that argument is that the Westfall Act and its exclusive-remedy provision were enacted forty years *after* § 2680's "shall not apply" language and, as *Smith* reasoned, the Westfall Act made pellucidly clear that state-law tort claims against federal employees, even for conduct within § 2680's exceptions, are wholly precluded. For example, the Westfall Act provided that, whenever the Attorney General certifies that a federal employee named as a defendant was acting in the scope of his employment, the United States shall be substituted as defendant and the suit "shall proceed in the same manner" as any FTCA action "and shall be subject to the *limitations and exceptions* applicable to those actions." 28 U.S.C. § 2679(d)(4) (emphasis added). The "exceptions" are those expressly "designated as such under § 2680." *Smith*, 499 U.S. at 166. Thus, as *Smith* concluded, Congress plainly contemplated that its new provisions *would* govern actions falling within the

§ 2680 "exceptions"—notwithstanding that section's longstanding "shall not apply" formulation. After all, a "later enactment governs" over an earlier one. *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring).

By contrast, the judgment bar was part of the FTCA as originally enacted, when Congress provided that its provisions would simply "not apply" to the types of claims described in § 2680. And there is *no* evidence from any other aspect of the scheme that Congress wanted or expected the judgment bar to apply, nonetheless, to claims falling within § 2680. *Smith* therefore does not write "shall not apply" out of § 2680: While those words do not overcome plain congressional intent with respect to application of the subsequently enacted exclusive-remedy provision of the Westfall Act, they do directly foreclose application of § 2676 in cases like this one.

B. Jurisdictional Dismissals Are Not "Judgments" "Under" the FTCA, Within the Meaning of the FTCA Judgment Bar

Even if § 2676 were applicable in the first place, it is not triggered when a putative FTCA claim is dismissed for lack of jurisdiction. Such a dismissal is not a "judgment" entitled to *any* preclusive effect, much less the special preclusive effect afforded by § 2676. Nor is it a judgment in an action "under" the FTCA; if the court lacks jurisdiction, the action by definition does *not* arise under that Act. Petitioners' contrary arguments ignore the Act's context and defy basic *res judicata* principles.

1. Section 2676 creates a "bar" to subsequent litigation where there has already been a "judgment" in an action "under" the FTCA's jurisdictional provision, 28 U.S.C. § 1346(b). The critical question is therefore what constitutes a "judgment" "under" § 1346(b). To answer, it is necessary to understand the provision's context.

After all, as this Court has often reiterated, the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). A "fundamental canon of statutory construction" is thus "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

The context of § 2676 is preclusion and *res judicata*. As *Will* recognized, the closest "analogy to the judgment bar" is "claim preclusion, or res judicata," because the § 2676 bar "functions in much the same way" and was motivated by the same "concern"—"avoiding duplicative litigation." 546 U.S. at 354. To be sure, § 2676 "is arguably broader than traditional *res judicata*"; otherwise it would have served no purpose. *Id.* To be precise, when Congress enacted the FTCA, a judgment in a suit against a federal employee would—under ordinary preclusion rules—have barred a subsequent *respondeat superior* claim against the Government. *See Restatement of Judgments* § 99 (1942) ("valid judgment on the merits ... in favor of a person charged with the commission of a tort ... bars a subsequent action ... against another responsible for the conduct of such person"); *see also id.* § 96(1)(a) & cmt. 2 (applying same rule in master-servant scenario, where servant is sued first). But if a plaintiff were to assert *respondeat superior* liability against the employer *first*, the Restatement took the view that the unsuccessful plaintiff *could* sue the employee. *Id.* § 96(2) cmt. j ("Where an action is brought first against the one secondarily liable there is ordinarily no reason for an exception to the ordinary rules of

mutuality and hence ... there is ordinarily no reason for binding the unsuccessful claimant in the subsequent action."). A number of state courts disagreed with the Restatement, holding that a judgment in a suit against a master "is a bar" to a subsequent suit against the servant. *E.g.*, *Wolf v. Kenyon*, 273 N.Y.S. 170, 173 (N.Y. App. Div. 1934); *Jones v. Valisi*, 18 A.2d 179, 181 (Vt. 1941). Congress in § 2676 embraced the latter position, even using the same *res judicata* language of a "bar" to suit against the employee. *Cf. Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) ("[c]laim preclusion describes the rules formerly known as 'merger' and 'bar'"). The judgment bar was thus designed to ensure symmetry in *res judicata* treatment of tort claims against the Government and its employees; traditional preclusion rules protected the Government if the employee was sued first, and § 2676 would protect employees if the Government were sued first. *See* Pfander, *supra*, at 427–45.

Given that context, the word "judgment" used in § 2676 must be understood, against the backdrop of *res judicata*, as referring to judgments capable of having some preclusive effect in the first place. The section's purpose was to *expand* that preclusive effect to *non-parties*—not to grant such effect to judgments that *never* would have had preclusive force *even against the original litigants*. Section 2676 clarified and supplemented preclusion rules, but did not wholly reinvent them. *Cf. Badaracco v. Comm'r*, 464 U.S. 386, 403 n.3 (1984) ("[i]t is axiomatic that statutes in derogation of the common law should be narrowly construed").

Dismissals for lack of jurisdiction *never* have claim-preclusive effect; they did not at the time the FTCA was enacted, and they still do not. *See Restatement of*

Judgments § 49 & cmt. a (1942) (no claim-preclusive effect "where the judgment is based on the lack of jurisdiction"); *Restatement (Second) of Judgments* § 20(1)(a) (1982) (no bar to "another action" when "the judgment is one of dismissal for lack of jurisdiction" or "improper venue"); *Hughes v. United States*, 71 U.S. 232, 237 (1866) (where "first suit was dismissed for ... want of jurisdiction," dismissal "will prove no bar to another suit"). After all, "[i]f there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *Mayor v. Cooper*, 73 U.S. 247, 250 (1867). Such a dismissal is therefore not a "judgment" within the meaning of § 2676. A dismissal for lack of jurisdiction would not even preclude the plaintiff from suing the *original defendant* on a claim arising from the same events, so why would it preclude suing a *non-party* based on those events? On Petitioners' counter-contextual construction, § 2676 would give a jurisdictional dismissal more potent preclusive effect as to non-parties than with respect to the original litigants.

For similar reasons, dismissal for lack of jurisdiction due to § 2680 is not dismissal of "an action under" § 1346(b). When a court dismisses an FTCA action pursuant to § 2680, it is ruling that § 1346(b)—a jurisdictional grant—does "not apply." In other words, "the action was not *properly* brought *under* the Federal Tort Claims Act in the first place." *Hallock*, 387 F.3d at 155, *vacated on other grounds*, *Will*, 546 U.S. 345. To be sure, a court "has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002); Pet. 11. But if the court determines that jurisdiction in an FTCA suit is lacking, particularly if it was expressly stripped by § 2680, the suit was not—as it turns out— "under" § 1346(b).

Finally, to close the loop, there is no dispute in this case that the exceptions to FTCA liability found in § 2680 are jurisdictional in nature. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–14 (2006) (explaining differences between jurisdictional facts and elements of claim). Section 1346(b) "is the jurisdictional provision of the FTCA." Pet. 3. Absent that provision, there would be no jurisdictional authority for any federal court to hear state-law tort claims against the United States. Moreover, because "[s]overeign immunity is jurisdictional in nature," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), the courts' jurisdiction in FTCA actions also depends on § 1346(b)'s limited waiver of sovereign immunity, *see id.* at 475–77. And § 2680 expressly says that § 1346(b) "*shall not apply*" to claims falling within its enumerated exceptions. Hence, as Petitioners agree, "this Court and the courts of appeals have generally recognized that Section 2680's exceptions to FTCA liability constitute 'jurisdictional' limits on the power of courts to adjudicate FTCA claims." Pet. 3–4. And, in this case, the Government obtained dismissal of Himmelreich's tort claim by contending that the district court "lack[ed] subject matter jurisdiction." Dkt. 31, *Himmelreich*, No. 4:10-CV-307 (N.D. Ohio Oct. 13, 2010); *see also* Pet. App. 49a (court agreeing).

In sum, § 2676 is a rule of preclusion; its terms must be construed in light of background principles of *res judicata*; and under those principles, dismissal for lack of subject-matter jurisdiction is not a "judgment" entitled to preclusive effect. Nor is it a judgment in an action "under" the inapplicable jurisdictional grant. Because § 2680's exceptions are jurisdictional limits on the FTCA, a dismissal under one of those exceptions is for lack of jurisdiction and does not trigger § 2676.

2. Petitioners briefly argue that § 2676's reference to "judgment" is not limited in *any* way, and therefore applies to *all* judgments, notwithstanding the far more limited statutory context and function. Pet. 12. But, perhaps recognizing the absurd results of such a construction, *see infra* Part V.C, they then contend at greater length that, even if the Sixth Circuit were correct that § 2676 is limited to judgments "on the merits," dismissals under § 2680 *are* "on the merits," because the § 2680 exceptions are "substantive" in addition to jurisdictional. Pet. 13–16.

Petitioners misunderstand the meaning of "on the merits." As this Court has explained, a judgment "on the merits" was historically synonomous with a judgment "entitled to claim-preclusive effect." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502–03 (2001). But "over the years," the phrase's meaning has changed, and in the context of claim preclusion it is now more accurate to distinguish directly between judgments that are entitled to claim-preclusive effect and those that are not. *Id.* "That is why the Restatement of Judgments has abandoned the use of the term ['on the merits']—'because of its possibly misleading connotations.'" *Id.* at 503 (quoting *Restatement (Second) of Judgments* § 19, cmt. a). Nonetheless, many courts continue to refer to a judgment "on the merits" as a prerequisite for claim preclusion, when they mean, more precisely—albeit less descriptively—that there must be a type of judgment entitled to claim-preclusive effect. *See id.* at 502. That is surely how the Sixth Circuit intended the phrase, when it explained that § 2676 is triggered only by a judgment "on the merits," Pet. App. 8a, as opposed to one for "lack of subject-matter jurisdiction," Pet. App. 6a.

In other words, whether § 2680 dismissals can properly be characterized as "substantive" is irrelevant. *Cf.* Pet. 14–15. Either way, they are still dismissals *for lack of jurisdiction*—as Petitioners admit. Pet. 14. Under *res judicata* principles, they are therefore *not* entitled to claim-preclusive effect. And that is why they do not trigger the judgment bar, which merely expands the existing *res judicata* effects of FTCA judgments to overcome traditional mutuality requirements.

Petitioners ultimately confront this point, and assert that a sovereign-immunity dismissal *does*, in fact, have claim-preclusive effect. Pet. 18–20. Again, Petitioners are conflating two distinct concepts. *State* sovereign immunity, as a matter of *state law*, may well be an affirmative defense that does not deprive *state* courts of subject-matter jurisdiction. And, if so, a dismissal on that basis would be preclusive. Thus, for example, the first case Petitioners cite on this point (Pet. 19 n.11), *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 & n.3 (5th Cir. 1984), relies on a Texas decision holding "sovereign immunity" to be an "affirmative defense," *Herring v. Tex. Dep't of Corrs.*, 500 S.W.2d 718, 719-20 (Tex. Ct. Civ. App. 1973).[5] But the sovereign immunity of the *United States*, as a matter of *federal law*, is decidedly a jurisdictional limit on the *federal* courts, not an affirmative defense. *Meyer*, 510 U.S. at 475. Thus, dismissals on that basis are jurisdictional, and have "no *res judicata* effect." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

[5] Similarly, *Kutzik v. Young*, 730 F.2d 149, 151 (4th Cir. 1984), relied on Maryland law, under which sovereign immunity is a "legal defense," not a "jurisdictional" deficiency, *Annapolis Urban Renewal Auth. v. Interlink, Inc.*, 405 A.2d 313, 318 (Md. Ct. Spec. App. 1979). *Accord Beaver v. Bridwell*, 598 F. Supp. 90, 93 (D. Md. 1984) ("under Maryland law, a dismissal based upon sovereign immunity defense is a final judgment on the merits").

In short, Petitioners *do not* deny that the § 2680 exceptions are jurisdictional, and *cannot deny* that jurisdictional dismissals have no claim-preclusive effect. With those two propositions combined, the Sixth Circuit's ruling is unassailable.

4. Finally, it is worth noting that neither of the two Courts of Appeals that allegedly disagree with the decision below has adopted Petitioners' reading of § 2676. The Seventh Circuit, as discussed above, holds that the § 2680 exceptions are mere affirmative defenses—and, on that view, a dismissal under § 2680 would be entitled to claim-preclusive effect under the common law, and thus to § 2676's expanded preclusive effect as against non-parties. *See supra* Part I.B. And in the Ninth Circuit, Judge Clifton's concurrence reasons that *not* all dismissals trigger the judgment bar; those based on "procedural defect[s]" do not, in his view. *Pesnell*, 543 F.3d at 1046 (Clifton, J., concurring). Thus, Petitioners' position is that not a single Court of Appeals has ever correctly construed the judgment-bar provision in the nearly seventy years it has been on the books, despite its supposedly "plain" text Tellingly, Petitioners proceed to offer Judge Clifton's construction as an "alternative basis" to reverse the decision below, Pet. 12 n.7, thereby belying their aggressive, repeated insistence that § 2676's meaning is clear and admits of no exceptions.

C. Any Contrary Rule Would Have Absurd Implications

It is no surprise that the text of the judgment bar does not encompass the scenario presented here. Not only would such a result make no sense in light of the purposes of the FTCA and cause a host of absurd results, it would also *undermine* Congress's objectives in enacting the landmark statute.

First, Petitioners' wooden reading causes a host of absurd results. Their view is that the "plain text" of § 2676 "does not limit its scope" in any way, Pet. 10, 12, and so any "entry of judgment" in a suit invoking the FTCA (even only implicitly, as here, Pet. App. 47a–48a) precludes subsequent *Bivens* actions. On that construction, if a plaintiff erroneously filed his FTCA suit in the *Southern* District of Ohio instead of the *Northern* District, leading to dismissal without prejudice for improper venue, 28 U.S.C. § 1402(b), he could refile that suit—but would somehow be precluded from filing a *Bivens* action. Or, if the FTCA action was dismissed for lack of jurisdiction because the federal employee was not acting within the scope of employment at the time of the tort—a holding that means the employee himself ought to be "personally answerable," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423 (1995)—a suit against the employee, paradoxically, would then be *precluded*. That makes no sense. Yet these bizarre consequences are compelled by Petitioners' interpretation.

Second, the practical consequence of that broad reading is that injured parties would have every incentive to sue the employee *first*—to avoid the risk of a jurisdictional dismissal under the FTCA extinguishing the right to bring a *Bivens* action. Section 2676, after all, precludes only the *latter* based on the *former*, not vice versa. But one of the principal objects of the FTCA was to offer a direct remedy against the deep-pocketed Government so as to *discourage* personal-capacity suits against federal employees, which "attack ... the morale of the services." *Gilman*, 347 U.S. at 511 n.2. The Westfall Act took that one step further by forbidding most suits against employees, because "the threat of protracted personal tort litigation

would seriously undermine the morale and well-being of federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the [FTCA] as the proper remedy for federal employee torts." *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989). That Petitioners' construction of § 2676 would *heighten* that threat is yet another confirmation that it is badly misguided.

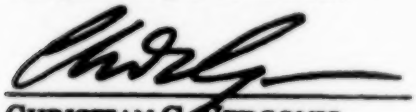
Finally, if injured parties did *not* sue the employee first, Petitioners' reading would deprive them of any opportunity to remedy their injuries—even if they are otherwise entitled to relief from *someone* as a matter of both fact and law. It may well be that § 2680 bars relief *from the Government*. But that hardly implies that the employee has complied with the Constitution. To the contrary, it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980). That is why Congress expressly exempted *Bivens* claims from the Westfall Act's exclusive-remedy provision. *See* 28 U.S.C. § 2679(b)(2)(A). Yet, on Petitioners' reading, a judicial decision finding the FTCA *inapplicable*—even if § 2680's applicability presented a close question, and the plaintiff's claim was legally colorable—would be a death knell for the "parallel" *Bivens* remedy. Nothing in the FTCA's purposes or history supports that strange result. The Act was not designed to minimize litigation at all costs (*cf.* Pet. 24), but rather to give plaintiffs a choice between two remedies. If one of those remedies is categorically unavailable, that is *all the more reason* to extend the other.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

September 22, 2015

Respectfully submitted,



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No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 15-109

JERMAINE SIMMONS, ET AL., PETITIONERS

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WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Sixth Circuit's decision in this case misconstrued the Federal Tort Claims Act (FTCA) judgment bar and created a clear split of authority with the Seventh and Ninth Circuits. Respondent's efforts to deny the circuit split, minimize the significance of the judgment bar, and provide alternative rationales for the court of appeals' bottom-line conclusion all lack merit. This Court should grant certiorari and finally resolve the issue that it was unable to reach in *Will* v. *Hallock*, 546 U.S. 345 (2006).

A. The Circuit Split Is Real

The court of appeals' decision in this case creates a square split with decisions of the Seventh and Ninth Circuits. See Pet. 21-24. In both of those circuits, the FTCA judgment bar, 28 U.S.C. 2676, applies to FTCA judgments of dismissal pursuant to the exceptions to FTCA liability set forth in 28 U.S.C. 2680. Pet. 22-24. Here, in contrast, the Sixth Circuit held that the

judgment bar does not apply to such judgments. Pet. App. 6a.

1. Respondent argues that there is no "genuine disagreement" between the Sixth Circuit's decision in this case and the Ninth Circuit's decision in *Pesnell* v. *Arsenault*, 543 F.3d 1038 (9th Cir. 2008). Br. in Opp. 11 (capitalization omitted). He is wrong.

In *Pesnell*, the plaintiff had filed an FTCA claim against the United States alleging (among other things) misrepresentation in violation of Arizona law. 543 F.3d at 1041. The district court dismissed that misrepresentation claim for lack of jurisdiction pursuant to 28 U.S.C. 2680(h), which exempts such claims from the scope of the FTCA, and the Ninth Circuit affirmed. See *Pesnell*, 543 F.3d at 1041.

The plaintiff then filed a new lawsuit against the federal employees, alleging a constitutional cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and a statutory claim under the Racketeer Influenced and Corrupt Organizations Act (RICO). *Pesnell*, 543 F.3d at 1040-1041. The facts alleged in those claims partially overlapped with the misrepresentation claim that had been dismissed in his earlier lawsuit against the United States. *Id.* at 1041-1042. The district court dismissed the RICO and *Bivens* claims—in their entirety—pursuant to the judgment bar. *Id.* at 1041. A Ninth Circuit panel unanimously reversed that blanket dismissal. *Id.* at 1044. In doing so, however, the court held that the FTCA judgment bar *did* bar the RICO and *Bivens* claims to the extent they involved the same misrepresentations alleged in the FTCA case. *Id.* at 1041-1042 & n.3. The court expressly stated that "[the plaintiff's] claims, including

his constitutional claims, are barred [by the FTCA judgment bar] to the extent that they rest upon the same misrepresentations alleged in the dismissed [FTCA] action." *Id.* at 1041-1042 n.3; see *id.* at 1042 ("[T]he aspect of the RICO claims based on the same alleged employees' misrepresentations is foreclosed by the judgment bar rule.").

In discussing the judgment bar, the court expressly endorsed the lengthier analysis set forth in Judge Clifton's concurring opinion. *Pesnell*, 543 F.3d at 1042 ("We agree with the concurring opinion" with respect to "the application of the judgment bar rule to this case."). In that opinion, Judge Clifton explained that "a portion of [the plaintiff's] current claim is foreclosed by the judgment bar under [Section] 2676, as my colleagues agree (*see* majority opinion, at 1042)." *Id.* at 1044; see *id.* at 1044-1047.

Respondent describes (Br. in Opp. 17, 19) the *Pesnell* decision as "confused" and "ambiguous." But the decision is clear that the judgment bar applies to FTCA judgments of dismissal for lack of jurisdiction pursuant to the exceptions to liability set forth in 28 U.S.C. 2680. Both the unanimous panel decision and the concurrence unambiguously applied the judgment bar to the dismissal of the plaintiff's prior FTCA case under Section 2680(h). See *Pesnell*, 543 F.3d at 1041-1042 & n.3, 1044. *Pesnell* squarely conflicts with the Sixth Circuit's decision here, which held that Section 2680 dismissals do not trigger the judgment bar. Pet. App. 6a.

Respondent is wrong to suggest (Br. in Opp. 19) that the district courts are generally confused over *Pesnell*'s holding. Although he correctly identifies (*ibid.*) one district court that appears to have misun-

derstood *Pesnell*, see *Williams* v. *FDIC*, No. 07-C-4672, 2009 WL 1209029, at *2 (N.D. Ill. Apr. 30, 2009), aff'd, 597 F.3d 820 (7th Cir. 2010), the other cases he cites—along with numerous others—agree that *Pesnell* holds that the FTCA judgment bar *does* apply to FTCA judgments of dismissal for lack of jurisdiction under Section 2680. See *Donahue* v. *Connolly*, 890 F. Supp. 2d 173, 184 (D. Mass. 2012) (quoting Judge Clifton's concurrence and correctly explaining *Pesnell*'s holding that jurisdictional dismissals based on an "exception" to FTCA liability trigger the judgment bar); see also, *e.g.*, *Wright* v. *City of Santa Cruz*, No. 13-cv-01230, 2014 WL 5830318, at *3 n.5 (N.D. Cal. Nov. 10, 2014); *Kaufman* v. *Baynard*, No. 1:10-CV-0071, 2012 WL 844480, at *9 (S.D. W. Va. Feb. 3, 2012); *Janis* v. *United States*, No. 1:04-cv-05812, 2011 WL 1258521, at *2 (E.D. Cal. Mar. 30, 2011).

2. Respondent also denies (Br. in Opp. 14) that there is a conflict between the Sixth and Seventh Circuits. But there is no doubt that those circuits have announced different conclusions to the question presented in the petition. Whereas the Seventh Circuit applies the FTCA judgment bar to judgments of dismissal under 28 U.S.C. 2680, the Sixth Circuit does not. See Pet. 22-23. Respondent does not—and cannot—deny that if he had brought his Eighth Amendment *Bivens* claim within the Seventh Circuit, that claim would have been dismissed pursuant to the judgment bar.

Respondent points out (Br. in Opp. 14-16) that the Sixth Circuit refuses to apply the judgment bar on the grounds that the FTCA judgment bar never applies to jurisdictional dismissals, whereas the Seventh Circuit holds that Section 2680 dismissals are not jurisdic-

tional in the first place. He observes (*id.* at 15) that "there is no conflict" over "whether [Section] 2676 applies to jurisdictional dismissals—because the Seventh Circuit has never answered that question."

That is true, but beside the point. As noted above, the circuits are divided over whether the FTCA judgment bar applies to dismissals under Section 2680. The fact that the circuits have approached that question in different ways—and that they disagree over whether the Section 2680 exceptions are jurisdictional—cannot obscure the fact that they disagree as to the proper resolution of the question presented here. Indeed, that the Circuits are divided not just on result but on rationale is yet another reason that certiorari is warranted.

B. The Question Presented Is Important And Should Be Resolved In This Case

Respondent also urges (Br. in Opp. 20-27) this Court to deny review for a variety of prudential reasons. None of his concerns has merit.

1. Respondent is mistaken to suggest that the proper application of the judgment bar is unimportant. This Court concluded otherwise when it granted certiorari—on the exact same question presented—in *Will*. Although respondent argues (Br. in Opp. 21-23) that the judgment bar is less significant now than it was before passage of the Westfall Act in 1988, nothing has happened to diminish the importance of the bar since this Court granted review in *Will* in 2005. If anything, the judgment bar appears to have become *more* significant: A search of the Westlaw database reveals that the judgment bar has been cited in roughly 100 cases since *Will* was granted—nearly

twice as many times as it was cited in the entire six preceding decades.

Respondent points out (Br. in Opp. 20-21) that few appellate decisions have addressed the judgment bar since *Will*. But that is not a sign that the issue lacks importance. Rather, it likely reflects *Will*'s holding that when a district court denies a federal employee's motion to dismiss a tort claim based on the FTCA judgment bar, the employee may not obtain interlocutory review of that decision. 546 U.S. at 347. Instead, the employee must wait to raise the judgment bar on appeal until after a final judgment in the case. By then, however, the employee may have already won a favorable judgment, either on the merits or based on qualified immunity. In such circumstances, there may be no need to address the judgment bar on appeal—even though the employee will have been deprived of the protections that Congress intended the judgment bar to provide. See, *e.g.*, *id.* at 354 (noting judgment bar's goal of "avoiding duplicative litigation"); *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (noting goals both of avoiding "very substantial burden[s]" involved with defending tort suits against federal employees and of avoiding adverse impact of such litigation "upon the morale" of government employees). The potential for such evasion of appellate review makes it especially important for this Court to provide guidance to district courts on how to correctly apply the bar in the first place.

Notably respondent's focus on the number of appellate rulings ignores the significant disagreement among district courts over the question presented here. See Pet. 24 n.14 (citing cases); see also, *e.g.*, *Miller* v. *SFF Hazelton*, No. 1:12-CV-98, 2015 WL

1021456, at *2-*3 (N.D. W. Va. Mar. 9, 2015) (applying judgment bar to Section 2680 dismissal); *Fawcett* v. *United States*, No. 4:13-CV-1828, 2014 WL 6687193, at *3 (N.D. Ohio Nov. 26, 2014) (following Sixth Circuit's decision here). Those divisions will only be resolved if this Court grants review.

2. Respondent also suggests (Br. in Opp. 24) that this Court should deny review so as to permit "[f]urther percolation" on the question presented. But no such percolation is warranted. The question presented has divided the circuits for at least a decade, and there is little reason to believe that any of the courts of appeals that have already weighed in will change their mind.

Respondent points out (Br. in Opp. 24-26) that courts have not yet addressed several potential arguments for holding the judgment bar inapplicable to Section 2680 dismissals, including (1) the argument that the judgment bar does not apply to *Bivens* claims at all, and (2) the argument that the judgment bar does not apply to Section 2680 dismissals because *no* provision of the FTCA applies to such cases. But respondent does not point to any case in which a litigant has raised either of these arguments, and there is little reason to expect the courts to address them anytime soon. Both arguments are also meritless. The first (which respondent does not even raise himself) requires creating a broad and atextual exception to Section 2676, and the second (which respondent does raise, see pp. 8-10, *infra*), contradicts other FTCA provisions and this Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1999). Neither provides a reason for this Court to deny review here.

3. Respondent also points out (Br. in Opp. 26-27) that this case is in an interlocutory posture. But the judgment-bar question is squarely presented; it turns on pure legal issues; and the proper resolution of those issues will bring the litigation over the Eighth Amendment *Bivens* claim to an end. Although respondent is correct that the judgment bar would not ultimately matter if petitioners prevail in the trial court, that ignores that the whole point of the judgment bar is to avoid such trials in the first place. See *Will*, 546 U.S. at 354; *Gilman*, 347 U.S. at 512 n.2.

4. Finally, respondent warns (Br. in Opp. 27) that because he only recently retained counsel to represent him in this case, there is "a heightened risk of unknown vehicle issues or other potential barriers to reaching the issue presented." But he does not identify any such vehicle problems, and petitioners are aware of none.

C. The Decision Below Is Wrong

Respondent advances (Br. in Opp. 28-40) a series of arguments in defense of the court of appeals' bottom-line conclusion that the FTCA judgment bar does not bar his claim. None of those arguments has merit.

1. Respondent's primary contention (Br. in Opp. 28-31) relies upon Section 2680's introductory language stating that "[t]he provisions of this chapter"—*i.e.*, Chapter 171 of Title 28 of the United States Code—"shall not apply to" any of the types of claims expressly identified in Section 2680(a)-(n). 28 U.S.C. 2680. He reasons that because the FTCA judgment bar is one of the "provisions of this chapter," that bar does not apply to FTCA claims dismissed under Section 2680. Respondent defends (Br. in Opp. 28-29) this argument (which no court has adopted) on the

grounds that it conforms to the "plain text" and "simple words" of Section 2680.

But respondent's textual argument is inconsistent with this Court's decision in *Smith*. There, the Court expressly held that 28 U.S.C. 2679—which, among other things, makes the FTCA the exclusive remedy for torts committed by federal employees within the scope of their employment, see 28 U.S.C. 2679(b)(2)—applies to claims that fall within the enumerated exceptions to FTCA liability set forth in 28 U.S.C. 2680. *Smith*, 499 U.S. at 161-162, 165-167. Section 2679 appears in Chapter 171 of Title 28, just like the judgment bar. *Smith*'s holding therefore does not make sense if respondent is right that Section 2680 renders the enumerated claims exempt from all of "[t]he provisions of this chapter."

To square his interpretation of Section 2680 with *Smith*, respondent turns to the FTCA's history. He points out (Br. in Opp. 30) that Section 2679 was enacted as part of the Westfall Act in 1988, and he argues that it should therefore not be considered one of "[t]he provisions of this chapter" under Section 2680. Instead, respondent appears to suggest (*id.* at 31) that the only "provisions of this chapter" that count for purposes of Section 2680 are those that were "part of the FTCA as originally enacted." His argument—which began as an effort to implement Section 2680's "simple words" (*id.* at 29)—thus ends up rewriting the statutory phrase "[t]he provisions of this chapter" to mean "[t]he provisions of this chapter, *but only insofar as they appeared in the original FTCA*." That contention fails as a textual matter, and it contravenes the principle that statutory provisions should be interpreted as a coherent whole, even when they have

been enacted at different times. See, *e.g.*, *Bilski* v. *Kappos*, 561 U.S. 593, 607-608 (2010).

The better reading of Section 2680—and the only reading consistent with *Smith*—is that the provision's introductory "shall not apply" language both exempts the enumerated categories of tort claims from the FTCA's waiver of sovereign immunity and imposes substantive restrictions on the liability of the United States in tort. But that provision does not exempt those categories of claims from other provisions of the FTCA—such as Section 2679(b) or the judgment bar—that expressly limit the remedies that tort claimants may pursue outside of the FTCA.

2. Respondent also advances (Br. in Opp. 28-40) a series of arguments to support the court of appeals' bottom-line conclusion that the "judgment" dismissing his FTCA case does not qualify as a "judgment" for purposes of the FTCA judgment bar. Petitioners touched on most of those arguments in the petition and will address them more fully on the merits if this Court grants review. For present purposes, however, two points are worth emphasizing.

First, although respondent asserts (Br. in Opp. 33) that the FTCA judgment bar only applies to judgments that are "capable of having some preclusive effect" under common-law res judicata principles, he is wrong to suggest that a Section 2680 dismissal lacks such preclusive effect simply because it also qualifies as a dismissal for lack of subject-matter jurisdiction. As explained in the petition (Pet. 13-17), dismissal of a case under Section 2680 reflects a substantive judgment, by Congress, that the United States should not be liable in the circumstances at issue. Such a dismissal is appropriately characterized as "on the merits,"

and it is entitled to res judicata effect even though it also reflects the district court's lack of jurisdiction. See, *e.g.*, *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-80 (1st Cir. 1985) (Breyer, J.) (explaining that res judicata attaches to judgments "on the merits," even if they also reflect a court's lack of "jurisdiction"), cert. denied, 476 U.S. 1159 (1986). Respondent is wrong to assert (Br. in Opp. 33) the existence of a blanket rule that "[d]ismissals for lack of jurisdiction *never* have claim-preclusive effect." See, *e.g.*, *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("[P]rinciples of res judicata apply to jurisdictional determinations—both subject matter and personal."); *Rose*, 778 F.2d at 79-80; *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (Scalia, J.) ("[T]he doctrine of *res judicata* applies to dismissal for lack of jurisdiction as well as for other grounds."); Restatement of Judgments § 49 cmt. b (1942).

Second, respondent is also wrong to argue (Br. in Opp. 34-35) that when an FTCA action is dismissed for lack of jurisdiction under Section 2680, that action does not qualify as "an action under section 1346(b)" for purposes of the FTCA judgment bar. 28 U.S.C. 2676. That argument is foreclosed by this Court's construction of similar language in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). There, the Court held that Section 2679(a)'s phrase "cognizable under section 1346(b)" encompasses all tort claims that satisfy the "six elements" set forth in Section 1346(b), regardless of whether the claim is "cognizable *under the FTCA* generally." *Meyer*, 510 U.S. at 477 & n.5; see generally Pet. Br. 31-38, *Will*, *supra* (No. 04-1332) (responding to same argument in greater detail). Respondent

makes no effort to explain why *Meyer*'s analysis does not govern the similar language in the FTCA judgment bar.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2015

No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 23, 2015
CERTIORARI GRANTED: NOV. 6, 2015

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 13-4212

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

AND

J. FITZGERALD; LIEUTENANT BUTTS; CORRECTIONAL OFFICER SIMMONS; MS. BUNTS; MS. NEWLAND, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/13	1	Prisoner Case Docketed. Notice filed by Appellant Walter J. Himmelreich. Transcript needed: n. (RB)
10/21/13	2	The case manager for this case is: Robin Duncan (RB)
11/1/13	6	CORRESPONDENCE: Letter regarding IFP forms to be filed in District Court by Walter J. Himmelreich. (RB)
11/4/13	7	APPEARANCE filed for Federal Bureau of Prisons and Appellees Bunts, Butts, J. Fitzgerald, Ms. Newland and Simmons by Lisa Hammond Johnson. Certificate of Service: 11/04/2013). (LHJ)

DATE	DOCKET NUMBER	PROCEEDINGS
12/13/13	11	Copy of District Court Order filed granting in forma pauperis (1915)(b)). (RB)
12/16/13	12	Update fee status change to 1915b. (RB)
12/16/13	14	BRIEFING LETTER SENT setting pro se briefing schedule: appellant brief due 01/28/2014;. appellee brief due 03/03/2014;. (RB)
12/26/13	15	Appellant MOTION filed by Walter J. Himmelreich to extend time to file brief. Certificate of service: Not provided. (RB)
1/6/14	16	RULING LETTER SENT granting motion to extend time to file brief [15] filed by Walter J. Himmelreich., resetting pro se briefing schedule: appellant brief now due 02/27/2014 FINAL EXTENSION. appellee brief now due 03/31/2014. (RB)
3/3/14	17	APPELLANT BRIEF filed by Walter J. Himmelreich Copies: 1. Certificate of Service: 02/27/2014. Argument Request: not received. (RB)
3/26/14	18	MOTION filed by Ms. Lisa Hammond Johnson for Butts, Simmons, J. Fitzgerald, Bunts and Ms. Newland to extend time to file brief.

DATE	DOCKET NUMBER	PROCEEDINGS
		Certificate of Service: 03/26/2014. (LHJ)
3/27/14	19	RULING LETTER SENT granting motion to extend time to file brief [18] filed by Ms. Lisa Hammond Johnson., resetting pro se briefing schedule: appellee brief now due 04/14/2014 FINAL EXTENSION (RB)
4/14/14	20	APPELLEE BRIEF filed by Ms. Lisa Hammond Johnson for Butts, Simmons, J. Fitzgerald, Bunts and Ms. Newland. Certificate of Service: 04/14/2014. Argument Request: waived. (LHJ)
4/28/14	21	Appellant MOTION filed by Walter J. Himmelreich to extend time to file reply brief. Certificate of service: 04/28/2014. (RB)
5/6/14	22	RULING LETTER SENT granting motion to extend time to file reply brief [21] filed by Walter J. Himmelreich. The reply brief is now due May 20, 2014. FINAL EXTENSION. (RB)
6/16/14	23	Appellant MOTION filed by Walter J. Himmelreich to extend time to file reply brief. Certificate of service: 06/12/2014. (RB)
7/10/14	24	Appellant LETTER filed regarding status of retrieving legal materials. Letter from Walter J.

DATE	DOCKET NUMBER	PROCEEDINGS
		Himmelreich. Dated: 06/26/2014. (RB)
7/14/14	25	Appellant LETTER filed regarding transfer of his legal materials. Letter from Walter J. Himmelreich. Dated: 07/09/2014. (RB)
8/7/14	26	Appellant LETTER filed regarding copies of the top of the box and FCI-Danbury receipt for the box of legal material received. Letter from Walter J. Himmelreich. Certificate of Service: 07/31/2014. (RB)
8/25/14	27	CORRESPONDENCE: Letter regarding boxes of legal material shipped to pro se's release residence by Walter J. Himmelreich. (RB)
9/9/14	28	PER CURIAM OPINION and JUDGMENT filed : The district court's grant of summary judgment is VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court. Decision for publication. R. Guy Cole, Jr., Chief Judge; Karen Nelson Moore and Julia Smith Gibbons, Circuit Judges. (CL)
9/26/14	29	Appellant MOTION filed by Walter J. Himmelreich under Federal Rule of Appellate Procedure 39 for

DATE	DOCKET NUMBER	PROCEEDINGS
		Costs and Value. Certificate of service: 09/20/2014. (RB)
10/23/14	30	APPEARANCE filed for Appellees Bunts, Butts, J. Fitzgerald, Ms. Newland and Simmons by Imran R. Zaidi. Certificate of Service: 10/23/2014. (IRZ)
10/24/14	31	PETITION for en banc rehearing filed by Mr. Imran Raza Zaidi for Butts, Simmons, J. Fitzgerald, Bunts and Ms. Newland. Certificate of Service: 10/24/2014. (IRZ)
11/17/14	32	MEMORANDUM IN SUPPORT filed regarding motion recover costs previously filed by Walter J. Himmelreich in 13-4212. Certificate of service: 11/10/2014. (RB)
1/5/15	33	Appellant LETTER filed regarding en banc petition. Letter from Walter J. Himmelreich. Certificate of Service: none; dated 12/20/2014. (BLH)
1/7/15	34	LETTER SENT to Walter J. Himmelreich in response to his letter dated 12/20/2014. (BLH)
3/10/15	35	ORDER filed denying petition for en banc rehearing [31] filed by Mr. Imran Raza Zaidi. Further, Himmelreich moves for an award of costs pursuant to Fed. R. App. P. 39 in this appeal. The court

DATE	DOCKET NUMBER	PROCEEDINGS
		vacated the summary judgment for defendants and remanded for further proceedings. Where a judgment is vacated, the award of costs is discretionary. Fed. R. App. P. 39(a)(4). Because Himmelreich has not yet prevailed on his claims, we deny the motion. In the event he is successful below, he may seek recovery of the appellate filing fee in district court under Fed. R. App. P. 39(e)(4), [29]. R. Guy Cole, Jr., Chief Circuit Judge; Karen Nelson Moore and Julia Smith Gibbons, Circuit Judges. (BLH)
3/18/15	36	MANDATE ISSUED with no costs taxed. (RB)
7/24/15	37	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Simmons. Supreme Court Case No: 15-109, 07/23/2015. (CL)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
(YOUNGSTOWN)

Docket No. 4:10-cv-02404-BYP

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/10		Judge John R. Adams assigned to case. (C,BA) (Entered: 10/22/2010)
10/21/10	1	**Complaint** against Ms. Bunts, Lieutenant Butts, Federal Bureau of Prisons, J. Fitzgerald, Five Unknown FCI-Elkton Medical Staff Members, Nurse Folkwein, Eric Holder, Doctor Lefever, Peter B. Macari, Ms. Newland, Roger Oberkramer, J.T. Shartle, Correctional Officer Simmons, Ten Unknown Agents of the Federal Bureau of Investigation, Ten Unknown Staff Members of the United States Department of Justice Freedom of Information Act Appeals Office in Washington, D.C., Twenty Unknown Executive Staff of the Fed-

DATE	DOCKET NUMBER	PROCEEDINGS
		eral Bureau of Prisons Northeast Regional Office and the Central Office, Twenty-five Unidentified FCI-Elkton Correctional Officers, Unknown FCI-Elkton Correctional Staff Members of the Bravo Unit Disciplinary Committee, Unknown FCI-Elkton Psychology Staff Screening Officer. Filing fee not paid, IFP. Copy to plaintiff. Plaintiff has indicated that case may be related to pending civil action 1:10cv307. Filed by Walter J Himmelreich. (Attachments: #1 Civil Cover Sheet) (C,BA) (Entered: 10/22/2010)
10/21/10		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Pearson. (C,BA) (Entered: (10/22/2010)
10/21/10	2	Affidavit of prisoner filed by Walter J. Himmelreich. (C,BA) (Entered: 10/22/2010)
10/25/10	3	Supplement to Complaint filed by Walter J. Himmelreich. Related document(s) 1. (B,B) Modified filing date to match time stamp on

DATE	DOCKET NUMBER	PROCEEDINGS
		10/27/2010 (S,He). (Entered: 10/26/2010)
11/08/10	4	**Order** directing the plaintiff to either pay the $350.00 filing or submit a complete financial application within 30 days of this order. Judge John R. Adams on 11/8/10. (K,C) (Entered: 11/08/2010)
11/08/10		Copy of 4 Order mailed to Walter J. Himmelreich on 11/8/10. Related document(s) 4. (K,C) (Entered: 11/08/2010)
11/29/10	5	**Motion** to proceed without prepayment of fees (affidavit of prisoner) filed by Walter J. Himmelreich. (Attachments: # 1 Inmate Statement, #2 Copy of Envelope Addressed to Clerk's Office, #3 Letter)(B,B) Modified to create motion event on 11/30/2010 (S, HR). (Entered: 11/29/2010)
1/14/11		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Baughman. (C,BA) (Entered: 01/14/2011)
3/11/11	6	**Order** granting plaintiff's Motion to proceed in forma pauperis (Related Doc #5). An initial fee is due in

DATE	DOCKET NUMBER	PROCEEDINGS
		the amount of $3.63 to be deducted from the prison account by the cashier. Thereafter, the prison cashier shall deduct 20% of defendant's preceeding months income each time the amount exceeds $10.00 until the full fee has been paid. Judge John R. Adams on 3/11/11. (K,C) (Entered: 03/11/2011)
3/11/11	7	**Memorandum Opinion and Order** dismissing this matter. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 3/11/11. (K,C) (Entered: 03/11/2011)
3/11/11	8	**Judgment Entry** dismissing this matter. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 3/11/11. (K,C) (Entered: 03/11/2011)
3/14/11		Copy of 6 Order on Motion to proceed without prepayment of fees, 8 Judgment, 7 Memorandum Opinion and Order mailed to Walter J. Himmelreich on 3/14/11. Related document(s) 6 , 8 , 7 . (R,Sh) (Entered: 03/14/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
4/11/11	9	**Motion** to alter or amend judgment under Federal Rule of Civil Procedure 59 (e) and for reconsideration of sua sponte dismissal of his Bivens action under 28 USC 1915 (e) filed by Plaintiff Walter J Himmelreich. (B,B) (Entered: 04/11/2011)
4/20/11	10	**Order** denying Plaintiff's Motion to alter/amend judgment (Related Doc #9) and denying Motion for reconsideration. Related Doc #9 Judge John R. Adams on 4/20/11. (K,C) (Entered: 04/20/2011)
4/20/11		Copy of 10 Order on Motion to alter/amend judgment and Order on Motion for reconsideration mailed to Walter J. Himmelreich at FCI Elkton on 4/20/11. Related document(s) 10. (K,C) (Entered: 04/20/2011)
4/29/11	11	**NOTICE OF APPEAL** to the 6th Circuit Court of Appeals from the 7 Memorandum of Opinion and Order and 8 Judgment of 3/11/11 and the 10 Order of 4/20/11, filed by Walter J Himmelreich. Filing fee not paid. (H,SP) (Entered: 05/04/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
5/2/11		Partial filing fee in the amount of $3.63 received from Walter Himmelreich. Receipt #14660044519 (C,BA) (Entered: 05/02/2011)
5/6/11	12	Acknowledgment from the USCA for Sixth Circuit of receipt of 11 Notice of Appeal (USCA# 11-3474). Date filed in USCA 5/5/11. (H,SP) (Entered: 05/06/2011)
5/12/11	13	**Order** requiring the Plaintiff to either pay the $455 filing fee or seek pauper status by submitting the attached financial application with a certified copy of the prisoner's trust account statement for the six month period immediately preceding the filing of notice of appeal within thirty (30) days. Related document 11. Judge John R. Adams on 5/12/11. (Attachments: # 1 Financial Application for Appeal)(R,Sh) (Entered: 05/12/2011)
5/12/11		Copy of 13 Order, mailed to Walter Himmelreich, #13152−067 at FCI Elkton, Unit B-A, P.O.Box 10, Lisbon, OH 44432 on 5/12/11. Related document(s) 13 . (R,Sh) (Entered: 05/12/2011)
6/13/11		Partial filing fee in the amount of $2.86 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660045490 (C,BA) (Entered: 06/13/2011)
6/22/11	14	**Order** that Plaintiff failed to furnish a certified trust account statement or Acknowledgment of Understanding so the filing fee of $455.00 is assessed against Plaintiff. The prison cashier shall deduct 20% of the proceeding months income credited to the prisoner's account each time the amount exceeds $10.00 until the full fee has been paid. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 6/22/11. (K,C) (Entered: 06/22/2011)
6/22/11		Copy of 14 Order, mailed to Walter J. Himmelreich and Prison Cashier at FCI Elkton on 6/22/11. Related document(s) 14 . (K,C) (Entered: 06/22/2011)
6/28/11	15	**Motion** to alter or amend order of 6/22/2011 under Federal Rule of Civil Procedure 59 filed by Plaintiff Walter J Himmelreich. (B,B) (Entered: 06/28/2011)
7/11/11		Partial filing fee in the amount of $5.90 received from Walter Himmelreich. Receipt #14660046100 (C,BA) (Entered: 07/11/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
7/14/11	16	**Marginal Entry Order** denying Defendant's motion to alter/amend judgment (Related Doc #15). Judge John R. Adams on 7/14/11.(K,C) (Entered: 07/14/2011)
7/14/11		Copy of 16 Order on Motion to alter/amend judgment mailed to Walter Himmelreich at F.C.I. Elkton on 7/14/11. Related document(s) 16. (K,C) (Entered: 07/14/2011)
8/9/11		Partial filing fee in the amount of $4.02 received from Walter Himmelreich. Receipt #14660046679. (C,B) (Entered: 08/09/2011)
10/24/11		Partial Filing fee in the amount of $7.92 received from Walter Himmelreich. Receipt #14660048292. (C,B) (Entered: 11/08/2011)
1/10/12		Partial filing fee in the amount of $6.29 received from Walter Himmelreich. Receipt #14660049885 (C,BA) (Entered: 01/10/2012)
2/9/12		Partial filing fee in the amount of $5.52 received from Walter Himmelreich. Receipt #14660050577 (C,BA) (Entered: 02/09/2012)
4/10/12		Partial filing fee in the amount of $3.96 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660051928 (C,BA) (Entered: 04/10/2012)
5/8/12	17	Information copy of order from the USCA for the Sixth Circuit: Vacating the District Courts judgment on Himmelreichs First Amendment retaliation claim and Eighth Amendment failure-to-protect claim, and remand this claim for further proceedings not inconsistent with this order. Affirming the judgment in all other respects re 11 Notice of Appeal (USCA# 11-3474). This is not a mandate order. Circuit Judges: Moore, Cook and White. Date issued by USCA 5/7/12 (H,SP) (Entered: 05/08/2012)
5/16/12	18	**Motion** for an order of service by US Marshals filed by Plaintiff Walter J Himmelreich. (C,KA) Modified file date on 5/17/2012 (C,KA). (Entered: 05/17/2012)
5/17/12		Copy of 18 Motion for order of service by US Marshals mailed to plaintiff. (C,KA) (Entered: 05/17/2012)
6/11/12		Partial filing fee in the amount of $3.57 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660053361 (C,BA) (Entered: 06/11/2012)
7/2/12	19	True copy of mandate from the USCA for the Sixth Circuit: Vacating the District Court's judgment and remanding for further proceedings re 11 Notice of Appeal (USCA# 11-3474). Date issued as mandate 6/29/12, Costs: None (Related document 17) (H,SP) (Entered: 07/02/2012)
7/9/12		Partial Filing fee in the amount of $7.39 received from Walter Himmelreich. Receipt #14660053938. (C,B) (Entered: 07/24/2012)
7/13/12	20	**Order** denying Plaintiff's Motion for service (Related Doc # 18). The Clerk shall provide Plaintiff with proper forms for service upon the remaining 5 Defendants. Judge John R. Adams on 7/13/12.(K,C) (Entered: 07/13/2012)
7/13/12		Copy of 20 Order on Motion for order, copies on the complaint and 7 blank U.S. Marshal forms mailed to Walter Himmelreich at FCI Elkton on 7/13/12. Related document(s) 20. (K,C) (Entered: 07/13/2012)
7/20/12		Received 4 copies of Court Order document 20, and 4 copies of the

DATE	DOCKET NUMBER	PROCEEDINGS
		Complaint 1 from Walter J. Himmelreich. No copies of U.S. Marshal Forms were included. (B,R) (Entered: 07/20/2012)
8/7/12		Partial Filing fee in the amount of $4.78 received from Walter Himmelreich. Receipt #14660054597. (C,B) (Entered: 08/10/2012)
8/10/12	21	Letter to chambers regarding Service of the Complaint filed by Walter J Himmelreich. (R,Sh) (Entered: 08/13/2012)
8/28/12	22	**Order** directing the Clerk to provide summons to plaintiff. Upon return of completed summons, the Clerk shall combine those forms with the U.S. Marshal forms and service will begin. Judge John R. Adams on 8/28/12. (K,C) Modified text on 8/29/2012 (K,C). (Entered: 08/28/2012)
8/28/12		Copy of 22 Order mailed to Walter Himmelreich at FCI Elkton on 8/28/12. Related document(s) 22 . (K,C) (Entered: 08/28/2012)
8/28/12		Copy of 22 Order and ten (10) blank summons mailed to Walter J. Himmelreich at FCI Elkton on

DATE	DOCKET NUMBER	PROCEEDINGS
		8/28/2012. (M,TL) (Entered: 08/28/2012)
9/12/12	23	Appeal Remark from US Supreme Court: The petition for a writ of certiorari was filed on 8/2/12 and placed on the docket 9/6/12 as No. 12-6113 (H,SP) (Entered: 09/12/2012)
9/13/12		Partial filing fee in the amount of $4.78 received from Walter Himmelreich. Receipt #14660055385. (C,B) (Entered: 09/18/2012)
10/1/12	24	Original Summons and Complaint and U.S. Marshal forms issued to U.S. Marshal for service upon Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. (Attachments: # 1 U.S. Marshal Forms) (R,Sh) (Entered: 10/01/2012)
10/10/12		Partial filing fee in the amount of $7.39 received from Walter Himmelreich. Receipt #14660055943 (C,BA) (Entered: 10/10/2012)
10/10/12	25	Return of Service by U.S. Marshal by certified mail executed upon Ms. Bunts; Lieutenant Butts; Ms. Newland and Correctional Officer Simmons on 10/5/2012, filed on behalf of

DATE	DOCKET NUMBER	PROCEEDINGS
		Walter J Himmelreich (R,Sh) (Entered: 10/10/2012)
10/30/12	26	Appeal Order from US Supreme Court: The petition for a writ of certiorari is denied re 23 (No. 12-6113) (H,SP) (Entered: 10/30/2012)
11/1/12	27	**Motion** for temporary restraining order and preliminary injunction against the Federal Bureau of Prisons, Inmate Telephone Service (ITS), for violations of the Fourteenth Amendment Right to due process, the Fourteenth Amendment right to equal protection under the laws, and the First Amendment rights to freedom of speech and redress, and interfering with interstate commerce filed by Plaintiff Walter J Himmelreich. (Attachments: #1 TRULINCS Account Transaction Log-TRUFONE, #2 Notification Regarding Limitations on Inmate Telephone Calls)(B,B) (Entered: 11/01/2012)
11/14/12	28	Memorandum in **Opposition** to 27 **Motion** for temporary restraining order and **Motion** for preliminary injunction filed by Federal Bureau

DATE	DOCKET NUMBER	PROCEEDINGS
		of Prisons. (Johnson, Lisa) Modified text on 11/16/2012 (S,He). (Entered: 11/14/2012)
11/15/12	29	Supplement to 27 **Motion** for temporary restraining order **Motion** for preliminary injunction filed by Walter J Himmelreich. Related document(s) 27 . (Attachments: #1 Federal Bureau of Prisons Trulincs Account Transactions—Trufone—Personal Inmate Information)(E,P) (Entered: 11/15/2012)
11/16/12	30	Attorney Appearance *Co–Counsel* by Heather Tonsing Volosin filed by on behalf of Federal Bureau of Prisons. (Volosin, Heather) (Entered: 11/16/2012)
11/26/12	31	**Motion** to request clarification as to correct named defendant in case filed by Plaintiff Walter J Himmelreich. Related document(s) 28 . (E,P) (Entered: 11/26/2012)
11/26/12	32	**Response** to 28 Memorandum in **Opposition** to 27 **Motion** for temporary restraining order filed by Walter J Himmelreich. (B,B) Modified text and created link on 11/28/2012 (S,He). (Entered: 11/26/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
12/10/12	33	Writ of praecipe regarding temporary restraining order and **Motion** requesting a hearing on the motion for temporary restraining order be held by 12/21/2012 filed by Plaintiff Walter J Himmelreich. (Attachments: #1 Federal Bureau of Prisons TRULINCS Account Transactions—TRUFONE Personal Inmate Information)(B,B) (Entered: 12/10/2012)
12/11/12		Partial Filing fee in the amount of $12.78 received from Walter Himmelreich. Receipt #14660057258. (C,B) (Entered: 12/11/2012)
1/15/13		Partial filing fee in the amount of $16.18 received from Walter Himmelreich. Receipt #14660058033 (C,BA) (Entered: 01/15/2013)
1/16/13	34	Letter to Chambers with attached letter to the Clerk regarding docket sheet and service filed by Walter J. Himmelreich. (R,Sh) Modified filed date to match timestamp on document on 1/23/2013 (S,He). (Entered: 01/17/2013)
1/29/13	35	Return of Service by U.S. Marshal by certified mail executed upon Captain J. Fitzgerald on 1/24/2013,

DATE	DOCKET NUMBER	PROCEEDINGS
		filed on behalf of Walter J Himmelreich (R,Sh) (Entered: 01/29/2013)
2/7/13	36	**Case Management Conference Scheduling Order** with case management conference to be held on 3/14/2013 at 02:30 PM telephonically. Counsel for Defendants shall provide the Court with a contact number for Defendant representative as well as themselves. Judge John R. Adams on 2/5/13. (Attachments: #1 Report of Parties, #2 Rule 30.1, #3 Consent to Magistrate Judge, #4 Budget, #5 Policy and Procedure Manual)(K,C) (Entered: 02/07/2013)
2/7/13	37	**Order** denying Plaintiff's Motion for Temporary Restraining Order and for preliminary injunction (Related Doc #27); Denying Plaintiff's Motion to clarify (Related Doc #31); Denying Plaintiff's Motion for conference (Related Doc #33). Further, the Warden of F.C.I. Elkton is directed to make inmate Walter J. Himmelreich available by phone on 3/14/13 at 2:30 p.m. for the Case Management Conference. The Warden designee shall contact the court to provide a contact phone

DATE	DOCKET NUMBER	PROCEEDINGS
		number. Judge John R. Adams on 2/5/13.(K,C) (Entered: 02/07/2013)
2/7/13		Copy of 36 Case Management Conference Scheduling Order and 37 Order on Motion for Temporary Restraining Order, Order on Motion for preliminary injunction, Order on Motion to clarify, Order on Motion for conference mailed to both Walter Himmelreich and Warden at FCI Elkton on 2/7/13. Related document(s) 36 , 37 . (K,C) (Entered: 02/07/2013)
2/8/13		Partial Filing Fee in the amount of $8.02 received from Walter J. Himmelreich. Receipt # 14660058596 (S,R) (Entered: 02/08/2013)
3/8/13	38	**Motion** to continue Case Management Conference filed by Ms. Bunts, Lieutenant Butts, , J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. Related document(s) 36 . (Johnson, Lisa) Modified filers on 3/11/2013 (M,TL). (Entered: 03/08/2013)
3/8/13	39	**Order** granting Defendant's Motion to continue the case management conference (Related Doc #38). Conference is continued to 4/1/2013 at 02:00 PM at Courtroom 575

DATE	DOCKET NUMBER	PROCEEDINGS
		before Judge John R. Adams. Judge John R. Adams on 3/8/13.(K,C) (Entered: 03/08/2013)
3/12/13		Partial filing fee in the amount of $19.92 received from Walter Himmelreich. Receipt #14660059340 (C,BA) (Entered: 03/12/2013)
3/14/13	40	**Response** to 38 **Motion** to continue Case Management Conference filed by Walter J Himmelreich. (K,K) (Entered: 03/14/2013)
3/19/13	41	Returned Mail addressed to Warden FCI Elkton marked not deliverable as addressed, unable to forward. Related document(s) 39. (R,Sh) (Entered: 03/19/2013)
3/20/13		Copy of 39 Order on Motion to continue and 41 Returned Mail receipt mailed to Walter Himmelreich at FCI Elkton on 3/20/13. Unknown as to why FCI Elkton returned his mail, Plaintiff is currently at Elkton. Related document(s) 39, 41. (K,C) (Entered: 03/20/2013)
3/20/13	42	Letter regarding court orders and program statements filed by Walter J Himmelreich. (R,Sh) (Entered: 03/20/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
3/21/13		Copy of 39 Order mailed to Warden, FCI Elkton at Federal Correctional Institution, P.O. Box 10, Lisbon, OH 44432 on 3/21/2013. (S,He) (Entered: 03/21/2013)
4/1/13		**Minutes of proceedings** [non-document] before Judge John R. Adams. Case Management Conference held on 04/01/2013. (Court Reporter: none) Time: 20 minutes. (M,TL) Modified text on 4/4/2013 (S,He). (Entered: 04/01/2013)
4/9/13		Partial filing fee in the amount of $21.12 received from Walter Himmelreich. Receipt #14660059987 (C,BA) (Entered: 04/09/2013)
4/10/13	43	**Order.** This matter is assigned to the STANDARD track. Defendants have indicated that they intend to file an immediate dispositive motion. The motion shall be filed no later than April 26, 2013. Plaintiff shall respond by no later than May 31, 2013. Defendants shall reply no later than June 14, 2013. If the matter proceeds beyond this initial motion practice, the Court will schedule additional dates as necessary. Judge John R. Adams on

DATE	DOCKET NUMBER	PROCEEDINGS
		4/10/2013. (R,Sh) (Entered: 04/10/2013)
4/10/13		Copy of 43 Order, mailed to Walter J. Himmelreich on 4/10/2013. Related document(s) 43. (R,Sh) (Entered: 04/10/2013)
4/11/13	44	**Motion** to compel United States Marshals Service for the Northern District of Ohio, through the Office of the Clerk of the Court, to serve the complaint in the above captioned action upon the United States Attorney General and the United States Attorney's Office for the Northern District of Ohio, pursuant to 28 USC § 1361 filed by Plaintiff Walter J Himmelreich. (Attachments: #1 Exhibit–Byrd vs. Stone, #2 Exhibit—Affidavit, #3 Exhibit—USMS forms, #4 Exhibit—Letter dated 8/5/2012, #5 Exhibit—Letter dated 8/30/2013 and summons, #6 Exhibit—Letter dated 10/19/2013, #7 Exhibit—Letter dated 10/28/2013, #8 Exhibit —Letter dated 1/6/2013, #9 Exhibit —Letter dated 2/12/2013, #10 Exhibit—Affidavit and summons) (K,K) (Entered: 04/11/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/13	45	**Motion** for summary judgment filed by Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. (Attachments: #1 Brief in Support, #2 Affidavit—Declaration of Marisa Davidson, #3 Exhibit Attachment to Declaration—Document A, #4 Exhibit Attachment to Declaration—Document B) (Johnson, Lisa) (Entered: 04/26/2013)
4/29/13	46	Amended Certificate of Service filed by Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. Related document 45. (Johnson, Lisa) Modified text on 4/30/2013 (M,TL). (Entered: 04/29/2013)
5/7/13		Partial filing fee in the amount of $13.92 received from Walter Himmelreich. Receipt #14660060639 (C,BA) (Entered: 05/07/2013)
6/3/13	47	**Response** to **Motion** for summary judgment filed by Walter J Himmelreich. (Attachments: #1 Administrative Remedy, #2 Letter, # 3 Note to Fritz, #4 Note to Fritz, # 5 Note to Fritz, #6 Request for Administrative Remedy Informal

DATE	DOCKET NUMBER	PROCEEDINGS
		Resolution Form, FCI, Elkton, Ohio, #7 Request for Administrative Remedy Informal Resolution Form, FCI, Elkton, Ohio, #8 Note to Mr. Perine, #9 Request for Administrative Remedy, #10 Request for Administrative Remedy, #11 Program Statement, #12 Inmate Request to Staff, #13 Inmate Request to Staff, #14 Request for Administrative Remedy Informal Resolution Form FCI Elkton, Ohio) (Related doc 45)(B,B) (Entered: 06/04/2013)
6/11/13		Partial Filing fee in the amount of $18.49 received from Walter Himmelreich. Receipt #14660061394. (C,B) (Entered: 06/11/2013)
6/14/13	48	Supplement to 47 Plaintiff's Response filed by Walter J Himmelreich. Related document(s) 47 . (Attachments: #1 Exhibit—Attachments)(K,K) (Entered: 06/17/2013)
6/18/13	49	Newly received supplemental information and request to reinstitute Warden Shartle as a co-defendant in his personal capacity filed by Walter J Himmelreich. (Attachments: #1 Inmate Request to

DATE	DOCKET NUMBER	PROCEEDINGS
		Staff, #2 Administrative Remedy Generalized Retrieval Print-Out)Related document(s) 45 , 47 .(B,B) (Entered: 06/18/2013)
6/18/13	50	Reply to Plaintiff's 47 Response to Defendant's 45 Motion for Summary Judgment filed by all Defendants. (Attachments: #1 Affidavit Declaration of Marisa Davidson, #2 Exhibit Doc. A, Administrative Remedy Retrieval, Part 1, attachment to Declaration of Marisa Davidson, #3 Exhibit Doc. A, Administrative Remedy Retrieval, Part 2, attachment to Declaration of Marisa Davidson, #4 Exhibit Doc. B, Administrative Remedy, Attachment to Declaration of Marisa Davidson, #5 Exhibit Doc. C, Tort Claim Details, Attachment to Declaration of Marisa Davidson) (Johnson, Lisa) Modified text and added link on 6/19/2013 (M,TL). (Entered: 06/18/2013)
7/2/13	51	Traverse of Defendant's Second Declaration of Marisa Davidson filed by Walter J Himmelreich. (B,B) (Entered: 07/02/2013)
7/10/13		Partial Filing fee in the amount of $19.39 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660062130. (C,B) (Entered: 07/17/2013)
7/17/13	52	Notice of Termination of Counsel filed by All Defendants. (Volosin, Heather) (Entered: 07/17/2013)
7/18/13	53	**Order and Decision** granting Defendants' Motion for summary judgment (Related Doc #45). The complaint is dismissed. An appeal from this decision could not be taken in good faith. Judge John R. Adams on 7/18/13.(K,C) (Entered: 07/18/2013)
7/18/13	54	**Judgment Entry** granting Defendants' motion for summary judgment. The complaint is dismissed; An appeal from this decision could not be taken in good faith. Judge John R. Adams on 7/18/13. (K,C) (Entered: 07/18/2013)
7/18/13		Copy of 54 Judgment and 53 Order on Motion for summary judgment mailed to Walter Himmelreich at FCI Elkton on 7/19/13. Related document(s) 54 , 53 . (K,C) Modified mailed date on 7/19/2013 (K,C). (Entered: 07/18/2013)
8/12/13		Partial filing fee in the amount of $14.18 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660062948 (C,BA) (Entered: 08/12/2013)
8/13/13	55	**Motion** to alter or amend judgment under Federal Rule of Civil Procedure 59 (e) filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Request for Administrative Remedy Informal Resolution Form, #2 Request for Administrative Remedy Informal Resolution Form, # 3 Request for Administrative Remedy Informal Resolution Form, #4 Request for Administrative Remedy Informal Resolution Form) (B,B) (Entered: 08/13/2013)
8/27/13	56	Memorandum in **Opposition** to 55 **Motion** to alter/amend judgment filed by Ms. Bunts, Lieutenant Butts, J. Fitzgerald, Ms. Newland, Correctional Officer Simmons. (Johnson, Lisa) Modified text on 8/28/2013 (S,He). (Entered: 08/27/2013)
10/1/13	57	**Marginal Entry Order** denying Plaintiff's Motion to alter or amend judgment (Related Doc # 55). Judge John R. Adams on 10/1/2013.(R,Sh) (Entered: 10/01/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
10/1/13		Copy of 57 Order on Motion to alter/amend judgment mailed to Walter Himmelreich on 10/1/2013. Related document(s) 57. (R,Sh) (Entered: 10/01/2013)
10/11/13	58	**NOTICE OF APPEAL** to the Sixth Circuit Court of Appeals from the 53 Order and Decision and 54 Judgment Entry of 7/18/13, 57 Marginal Entry Order of 10/1/13, filed by Walter J Himmelreich. Filing fee not paid. (H,SP) (Entered: 10/15/2013)
10/11/13	59	**Motion** for in forma pauperis status, filed by Plaintiff Walter J Himmelreich (Related document(s) 58). (H,SP) (Entered: 10/15/2013)
10/11/13		Partial Filing fee in the amount of $.10 received from Walter Himmelreich. Receipt #14660064402. (C,B) (Entered: 10/17/2013)
10/16/13	60	**Order** directing plaintiff to either pay the full appeal fee of $455.00 or file the Financial Application within 30 days of this order or the appeal may be dismissed for want of prosecution. Judge John R. Adams on 10/16/13. (K,C) (Entered: 10/16/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
10/16/13		Copy of 60 Order mailed to Walter J. Himmelreich at FCI Elkton on 10/16/13. Related document(s) 60 . (K,C) (Entered: 10/16/2013)
10/22/13	61	Acknowledgment from the USCA for Sixth Circuit of receipt of 58 Notice of Appeal (USCA# 13-4212). Date filed in USCA 10/21/13. (H,SP) (Entered: 10/22/2013)
11/13/13		Partial filing fee in the amount of $1.20 received from Walter Himmelreich. Receipt #14660065083 (C,BA) (Entered: 11/13/2013)
11/18/13	62	**Financial Application** for appeal filed by Plaintiff Walter J Himmelreich (Related document(s) 60, 58). (Attachments: #1 Inmate Statement) (H,SP) (Entered: 11/18/2013)
11/19/13	63	Letter regarding In Forma Pauperis Appeal, 13-4212 filed by Walter J Himmelreich. (R,Sh) (Entered: 11/19/2013)
12/9/13		Partial filing fee in the amount of $1.68 received from Walter Himmelreich. Receipt #14660065745 (C,BA) (Entered: 12/09/2013)
12/10/13	64	**Order** granting Plaintiff's Motions to appeal in forma pauperis (Relat-

DATE	DOCKET NUMBER	PROCEEDINGS
		ed Doc #59 & #62). An initial partial fee in the amount of $10.91 is due and should be deducted from plaintiff's prisoner account. The prison cashier's office shall deduct 20% of the preceding month's income credited to the prisoner's account each time the amount in the account exceeds $10.00 until the full fee has been paid. Judge John R. Adams on 12/10/13.(K,C) (Entered: 12/10/2013)
12/10/13		Copy of 64 Order on Motion to appeal in forma pauperis mailed to Walter J. Himmelreich at FCI Elkton and prison cashier on 12/10/13. Related document(s) 64. (K,C) (Entered: 12/10/2013)
1/2/14		Partial Filing Fee in the amount of $10.91 received from Walter Himmelreich. Receipt #14660066254 (S,R) (Entered: 01/02/2014)
1/14/14		Partial filing fee in the amount of $13.40 received from Walter Himmelreich. Receipt #14660066518 (C,BA) (Entered: 01/14/2014)
2/11/14		Partial filing fee in the amount of $12.60 received from Walter Himmelreich. Receipt #14660067231 (C,BA) (Entered: 02/11/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
2/11/14		Partial filing fee in the amount of $2.60 received from Walter Himmelreich. Receipt #14660067238 (C,BA) (Entered: 02/11/2014)
3/14/14		Partial filing fee in the amount of $10.32 received from Walter Himmelreich. Receipt #14660068119 (C,BA) (Entered: 03/14/2014)
4/10/14		Partial filing fee in the amount of $1.18 received from Walter Himmelreich. Receipt #14660068746 (C,BA) (Entered: 04/10/2014)
4/10/14		Partial filing fee in the amount of $11.18 received from Walter Himmelreich. Receipt # 14660068759 (C,BA) (Entered: 04/10/2014)
4/28/14	65	**Motion** for temporary restraining order and **Motion** for preliminary injunction filed by Plaintiff Walter J. Himmelreich. (E,P) (Entered: 04/28/2014)
5/16/14	66	Address Change Notice filed by Walter J Himmelreich. (E,P) (Entered: 05/16/2014)
7/11/14		Partial filing fee in the amount of $4.90 received from Walter Himmelreich. Receipt #14660070803 (C,BA) (Entered: 07/11/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/14		Partial filing fee in the amount of $27.76 received from Walter Himmelreich. Receipt #14660071482 (C,BA) (Entered: 08/12/2014)
8/27/14	67	**Marginal Entry Order** denying Plaintiff's Motion for temporary restraining order and preliminary injunction (Related Doc # 65). Judge John R. Adams on 8/27/14.(L,J) (Entered: 08/27/2014)
8/27/14		Copy of 67 Order on Motion for order, Order on Motion for preliminary injunction mailed to Walter J. Himmelreich at Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 8/27/14. Related document(s) 67. (L,J) (Entered: 08/27/2014)
9/29/14	69	**Motion** for Pretrial Scheduling Conference, Discovery and Depositions if Necessary filed by Plaintiff Walter J Himmelreich. (B,R) (Entered: 09/30/2014)
10/10/14		Partial Filing fee in the amount of $2.76 received from Walter Himmelreich. Receipt #14660072828. (C,B) (Entered: 10/24/2014)
11/12/14		Partial filing fee in the amount of $8.08 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt #14660073527 (C,BA) (Entered: 11/12/2014)
12/9/14		Partial filing fee in the amount of $2.20 received from Walter Himmelreich. Receipt #14660074196 (C,BA) (Entered: 12/09/2014)
1/21/15		Partial filing fee in the amount of $4.08 received from Walter Himmelreich. Receipt #14660075075 (C,BA) (Entered: 01/21/2015)
2/23/15		Partial filing fee in the amount of $7.32 received from Walter Himmelreich. Receipt #14660075836 (C,BA) (Entered: 02/23/2015)
3/19/15	70	True copy of mandate from the USCA for the Sixth Circuit: Vacating the District Court's summary judgment and remanding for further proceedings re 58 Notice of Appeal (USCA#13-4212). Date issued as mandate 3/18/15, Costs: None (H,SP) (Entered: 03/19/2015)
3/25/15	71	**Order** of Recusal. This case is returned to the Clerk for reassignment to another judge. Judge John R. Adams on 3/25/15. (K,C) (Entered: 03/25/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
3/25/15		Copy of 71 Order reassigning case mailed to Walter Himmelreich at FCI Danbury on 3/25/15. Related document(s) 71. (K,C) (Entered: 03/25/2015)
3/25/15		Judge Benita Y. Pearson assigned to case. Judge John R. Adams terminated. (M,TL) (Entered: 03/25/2015)
3/30/15	72	**Order** referring case to Magistrate Judge William H. Baughman, Jr. for general pretrial supervision. Judge Benita Y. Pearson on 3/30/2015. (JLG) (Entered: 03/30/2015)
3/30/15		Copy of 72 Order of Referral mailed to Plaintiff Walter J. Himmelreich #13152-067, Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 3/30/2015. Related document(s) 72. (JLG) (Entered: 03/30/2015)
4/13/15	73	**Motion** to vacate referral to Magistrate Judge and proceed w/document 69 motion filed by Plaintiff Walter J Himmelreich. Related document(s) 72. (C,KA) (Entered: 04/14/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
4/14/15		Partial filing fee in the amount of $3.01 received from Walter Himmelreich. Receipt #14660077088 (C,BA) (Entered: 04/14/2015)
4/14/15	74	**Order** denying 73 Motion to vacate. Judge Benita Y. Pearson on 4/14/2015. (JLG) (Entered: 04/14/2015)
4/14/15		Copy of 74 Order denying Motion to Vacate mailed to Plaintiff Walter J. Himmelreich #13152-067, Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 4/14/2015. Related document(s) 74. (JLG) (Entered: 04/14/2015)
7/28/15	75	Appeal Remark from US Supreme Court: The petition for a writ of certiorari was filed on 7/23/15 and placed on the docket 7/23/15 as No. 15-109 (H,SP) (Entered: 07/28/2015)
8/11/15		Partial filing fee in the amount of $20.04 received from Walter Himmelreich. Receipt #14660079630 (C,BA) (Entered: 08/11/2015)
9/11/15	76	**Marginal Order** denying Plaintiff's 69 Motion, as requested, without prejudice to being refiled, if necessary. Judge Benita Y. Pearson on

DATE	DOCKET NUMBER	PROCEEDINGS
		9/11/2015. (JLG) (Entered: 09/11/2015)
9/11/15		Copy of 76 Marginal Order mailed to Plaintiff Walter J. Himmelreich #13152-067, Danbury FCI, Inmate Mail/Parcels, Route 37, Danbury, CT 06811 on 9/11/2015. Related document(s) 76 . (JLG) (Entered: 09/11/2015)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV2404

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS; FEDERAL BUREAU OF PRISIONS, T/D/B/A FEDERAL CORRECTIONAL INSTITUTION-ELKTON; FEDERAL INMATE PETER B. MACARI; FEDERAL INMATE ROGER OBERKRAMER; CAPTAIN J. FITZGERALD, FORMER SECURITY CAPTAIN OF FCI-ELKTON; LIEUTENANT BUTTS, FCI-ELKTON SIS SECURITY LT.; CORRECTIONAL OFFICER SIMMONS; MS. BUNTS, FCI-ELKTON HEALTH SERVICES ADMINISTRATOR; DOCTOR LEFEVER, FORMER FCI-ELKTON PSYCHOLOGY DEPARTMENT STAFF DR.; FIVE UNKNOWN FCI-ELKTON MEDICAL STAFF MEMBERS; NURSE FOLKWEIN, FCI-ELKTON MEDICAL STAFF; MS. NEWLAND, FCI-ELKTON UNIT BB CASE MANAGER; UNKNOWN FCI-ELKTON PSYCHOLOGY STAFF SCREENING OFFICER; UNKNOWN FCI-ELKTON CORRECTIONAL STAFF MEMBERS OF THE BRAVO UNIT DISCIPLINARY COMMITTEE; WARDEN J.T. SHARTLE, FCI-ELKTON WARDEN; TWENTY-FIVE UNIDENTIFIED FCI-ELKTON CORRECTIONAL OFFICERS; TWENTY UNKNOWN EXECUTIVE STAFF OF THE FEDERAL BUREAU OF PRISONS NORTHEAST REGIONAL OFFICE AND THE CENTRAL OFFICE; ATTORNEY GENERAL ERIC HOLDER; TEN UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION; TEN UNKNOWN STAFF MEMBERS OF THE UNITED STATES DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION ACT APPEALS OFFICE IN WASHINGTON, D.C.

[Filed: Oct. 21, 2010]

COMPLAINT UNDER BIVENS

Complaint in Violation of the Plaintiff's Constitutional Rights Against Cruel and Unusual Punishment Under the Eighth Amendment and in Violation of the Plaintiff's Civil Rights Under Bivens

I. **Previous Lawsuits**

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? YES ~~NO~~

B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit:

Plaintiffs **Walter J. Himmelreich**

Defendants **United States ofAmerica**

Case Number 10-00307 in Northern District of Ohio

2. Court (if federal court, name the district; if state court, name the county):

   US District Court, Nothern District of Ohio, Eastern Division

3. Docket Number: **4:10-cv-00307-JRA**

4. Name of judge to whom case was assigned **Judge John R. Adams**

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?):

   Currently Active on the Court's Docket

6. Approximate date of filing lawsuit: **February 11, 2010**

7. Approximate date of disposition: **Not Applicable**

II. **Place of Present Confinement: Federal Correctional Institution – Elkton**

A. Is there a prisoner grievance procedure in this institution? YES ~~NO~~

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? YES ~~NO~~

C. If your answer is "yes",

   1. What steps did you take? **Filed initial grievance regarding both security issues and one regarding medical co-pay**

2. What was the result? **Security Captain threatened me for filing and Medical Co-pay issue was not resolved.**

D. If your answer is "not", explain why not:

Not Applicable

E. If there is no prisoner grievance procedure in the institution, did you complain to prison authorities? YES NO

Not Applicable

F. If your answer is "yes",

1. What steps did you take? **Not Applicable**

2. What was the result? **Not Applicable**

III. **Parties**

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of the Plaintiff **Walter J. Himmelreich**

Federal Register # 13152-067

Address **FCI-Elkton P.O. Box 10 Unit BA Lisbon, OH 44432**

(In item B below, place the full name of the defendant in the first blank, his or her official position in the second blank, and his or her place of employment in the third blank. Use item C for the names, positions and places of employment of any additional defendants.)

B. Defendant **Fedearl Bureau of Prisons** is employed as **Not Applicable** at **Not Applicable**

C. Additional Defendants

See Attached Sheets

IV. **Statement of Claim**

(State here the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separated paragraph. Use as much space as you need. Attach extra sheet(s) if necessary.)

1) That on October 11, 2008, Federal Inmate Roger Oberkramer told the Plaintiff: "I'm going to find a place where there's no cameras and fuck you up!".

2) That the Plaintiff attempted to tell Federal Correctional Institution – Elkton (FCI-Elkton or Elkton) security staff officer who had told the Plaintiff that if he ever had any trouble to come and let him know about it, prior to October 20, 2008. This attempt was in vain as the Plaintiff could not find an opportunity to hold a private conversation regarding this topic.

3) That in the prison environment, a person who tells a correctional officer (C/O) of what transpired between himself and another inmate is considered to be a rat or a snitch and can lead to serious trouble for that inmate in the long run.

4) That when Federal Inmate Peter B. Macari was admitted as an inmate to Elkton, he was assigned to

Housing Unit BB, where Inmate Oberkramer was also assigned bed space.

5) That the Plaintiff did not have personal contact with Macari prior to October 20, 2008.

6) That prior to October 14, 2008, Macari was placed in the Special Housing Unit (SHU) for an infraction of the Elkton Rules and then refused his release from the SHU into the General Population portion of the compound, causing him to receive an incident report for refusing a program assignment on October 14, 2008.

7) That on October 16, 2008, Macari met with B-Unit Unit Disciplinary Team (UDC). During that particular meeting, he told them: "I have had a lot of stress here, am not able to live with pedophiles. Also, I am not able to take the right programs here, everything seems to be going against me. If I go back out on the compound, I will smash a pedophile.".

8) That the Plaintiff is reputedly, among the inmate community, one of the biggest pedophiles on the Elkton compound and is aware that other inmates have that perception of him. The biggest rumor about the Plaintiff on the Elkton compound is that he had two little boys in the trunk of his car crossing over state lines and taking them to have sex with them when he was apprehended and the boys were rescued by the cops. This is totally untrue.

9) That the Elkton staff does little to quash these types of rumors.

10) That Ms. Newland is and has been the BB Unit Case Manager.

11) That Ms. Newland, as a part of her duty assignment, would include her reviewing Macari's PreSentence Investigation Report (PSI), which would be in his "Red File", which every inmate has and which every Case Manager reviews on at least a periodic basis and more often should special circumstances arise (such as Macari's statement as to his intentions/should he be released from the SHU).

12) That as a Case Manager, Ms. Newland is supposed to be intimately involved in the general everyday events concerning the inmates in the unit in which she is a Case Manager for.

13) That a review of Macari's PSI will show that he has extreme violence in his past. He was sentenced to serve ten years in the Illinois State Prison System for First Degree Attempted Murder for beating a man over the head with a baseball bat as a Local 110 Projectionists Union enforcer while he was trying to earn his projectionist license in the Chicago area.

14) Further review of Macari's PSI will show that he was paroled from the State of Illinois to the Federal Bureau of Prisons to serve out his term of incarceration for an Arson charge.

15) That Ms. Newland failed in the performance of her duties in her failure to fully examine Macari's jacket, note the extreme violence that Macari was capable of, and then notify her superior(s), and/or the executive staff of Elkton, of the potential danger to as many as 20 percent or more of the general inmate population of Elkton; who could have stopped Macari's release from the SHU in any number of different ways.

16) That in order to be released from the SHU, there is a process that inmates must go through including having bed space available, approval of the Security Department, in this case approval of the Psychology Department, and approval of the executive staff during the weekly staff SHU meeting.

17) That Macari had been having some problems at home which also caused him stress at Elkton and which he told staff about both verbally and in writing.

18) That Macari had pleaded with the Elkton Staff, writing it out and giving it to the DHO, and UDC and even to Dr. Lefever.

19) That between October 16, 2008 and October 20, 2008, Macari was harassed by teasing and taunting from unknown SHU staff members who told Macari that he was a wimp and that he wouldn't harm anyone. (This harassment was a form of brainwashing which can't be ignored in the overall picture of what happened to the Plaintiff.)

20) That on October 20, 2010, Macari was released from the SHU and received his personal property and was sent back to BB housing unit to unpack and start melding back in to the everyday life in the Elkton inmate general population. Macari never unpacked his property that day.

21) That at approximately 15:20 on October 20, 2008, the normal institutional recall in preparation for the four PM standing count was called. The Plaintiff was working in the Elkton Facilities Department as an all day employee on that date and returned to his housing dormitory (BA) on the recall.

22) Walking back to the housing unit from Facilities that afternoon, the Plaintiff was walking back to the housing unit and chatting with Inmate Randy Winslow. The Plaintiff was also thinking about the Kent State University Course in Introduction to Business exam that he was scheduled to take that evening.

23) That Correctional Officer Simmons (Simmons) had been posted to B Unit as the Unit Security Officer on October 20, 2008, during the day watch because the regular officer was not available that day.

24) That during the Recall movement on October 20, 2008, Simmons was standing outside of the BA sally-port door, approximately 10 feet or more from the door, smoking cigarettes.

25) That the Plaintiff is unaware of who was working as the A Unit Security Officer on that day since the officer was not outside the door or standing in the sallyport during the controlled movement for recall that day.

26) That the Plaintiff was entering the sallyport and noticed Oberkramer with another inmate he did not recognize standing on the B Unit landing of the stair-well and pointing in the Plaintiff's direction with the unknown inmate nodding and gripping the handrail very tightly.

27) That as the Plaintiff climbed the stairs, he was still conversing with Inmate Winslow, was holding the railing with his right hand and had his left hand in his coat pocket. The unknown inmate was pacing back and forth on the landing at this time.

28) That as the Plaintiff was completing the staircase climb, was reaching for the handrail of the landing, and

still had his left hand in his coat pocket, and was taking the step to the landing, he saw Inmate Winslow duck and run for the B Unit door and into the Unit. At the same time, the Plaintiff saw the unknown inmate (later identified as Macari) coming towards the Plaintiff with his left hand in a fist, his left arm at a 90 degree angle and reared back, a mean scowl on his face, and then the largest fist the Plaintiff had ever seen coming directly towards his face.

29) That the Plaintiff moved his head to the side slightly and the large fist caught him in the left side of the Plaintiff's face. The Plaintiff's glasses flew against the far wall of the landing and when the Plaintiff recovered them, they were twisted and mangled from the blow on the left side of the face.

30) The Plaintiff then caught a second blow in the left rib cage from Macari's right fist which knocked some of the wind out of the Plaintiff. The Plaintiff then saw that he was up against a three and a half to four foot high railing, off balance, and that Macari had his back to the wall and could shove Plaintiff over the railing in short order, so the Plaintiff ducked below the railing level and headed towards the far wall and his glasses followed by Macari who was throwing more punches.

31) The Plaintiff then ended up lying on the floor is almost a fetal position, trying to protect his head with his arms and with his back facing Macari, continuously being pummelled and kicked in the head, back, and ribs.

32) That the inmates who were returning to B Unit during the Recall were yelling about the **FIGHT** in the stairwell and in the Unit, lound enough that it should

have attracted some attention, but neither Simmons nor the unknown A Unit correctional officer appeared to break up the fight or call other staff to do so.

33) That during all of this, Oberkramer was inside the B Unit door after the stairwell had cleared of the other inmates and was holding it closed so that the Plaintiff could not go in even if he had tried to.

34) That about a minute or so after the MOVE IS CLOSED announcement was heard, Oberkramer told Macari to stop before they got caught.

35) That the Plaintiff looked up at Oberkramer and Macari as they were leaving and asked in a pleading way "WHY?" and was told: by Macari "You know why, you little dick licker!". Then they left.

36) That the Plaintiff then pulled himself up off of the floor after gathering his glasses and clip on shades, opened the door, stood there for a minute propping the door open with his body, then proceeded inside to his cube to sit down on his bed. He took off his coat and then looked at his cellie and said "How bad is it?"; to which he was told "Pretty bad, go look in the bathroom mirror.".

37) That after the Plaintiff looked in the bathroom mirror, he realized that he could not hide the remnants of the assault and battery that he had taken and went out to the stairwell landing to wait for Simmons to come back in. He had left his coat in his cubicle while he waited on the landing, hunched over the railing.

38) That at approximately 15:50, Simmons and his shift replacement, Correctional Officer McMonagle (McMonagle) entered the building and began ascending the stairs. Simmons got halfway up the stairs

before he saw the Plaintiff on the landing and began to chew the Plaintiff out for being out of bounds, to which the Plaintiff replied "I was just assaulted by another inmate."

39) Then Simmons asked where and the Plaintiff told him "right here on the landing during recall." Simmons then said "Oh, shit!, Now I'm going to have a shitload of paperwork to do." As they reached the top of the stairwell, McMonagle took charge, told the Plaintiff to go into to C/O's Office and began clearing the TV Rooms on both BA and BB sides of the Unit, sending them all back to their cubicles early to await the Four O'Clock Stand-Up Count.

40) Then Simmons told the Plaintiff that he would take him over to the Lieutenant's Office and asked if the Plaintiff could identify the attackers. The Plaintiff said he could identify one of them, that he hadn't seen the second one around before, and that they had both gone over to the BB side of B Unit. The Plaintiff also then told Simmons that he had taken off his coat and it was in his cubicle and that they may want it for evidence as it had blood on it. Simmons then escorted the Plaintiff to the cubicle to get the coat and back to the C/O's Office, took the coat, wrapped the "bed book" id's in the coat, handed it all to the Plaintiff and then escorted the Plaintiff to the Lieutenant's Office.

41) That Simmons had not placed Macari's card in the "bed book rack" after Macari's return from the SHU earlier that afternoon was evidenced later when it was subsequently brought to the Lieutenants' Office separately and the person bringing the card said that it was found on the desk in the B Unit C/O's Office.

42) That the Plaintiff was asked to go through the BB bed book rack and pick out his assailants after the Plaintiff was escorted to the Lieutenants' Office. The Plaintiff was also asked to write down a statement (description) of what had happened to him and then the Plaintiff had pictures taken of his head and torso from the waist up.

43) That the Plaintiff's coat, newly issued hat and gloves were all kept as evidence for a possible criminal proceeding. No criminal proceeding has taken place and three weeks later when the Plaintiff was released from the SHU, his coat, hat and gloves were nowhere to be found. The Plaintiff later learned that they had been destroyed and was issued a replacement coat, old and worn gloves and a used hat.

44) That the Plaintiff was only able to pick out Oberkramer's picture from the bed book rack was understandable later when it was discovered that Macari's card was not in the rack.

45) That Oberkramer was then brought to the Lieutenants' Office (LT's Office) for questioning and verified that he had threatened the Plaintiff at that earlier time, saying in his defense that the Plaintiff had interrupted a personal conversation between himself and another inmate. The Plaintiff stated that he had not, that the Plaintiff had been in the BA stairwell lobby area, that he had only answered a third inmate's question regarding the large number of callouts for education on the next day (a Sunday), which caused Oberkramer to flare up at the Plaintiff because he himself did not know the real reason for all of the callouts. That was when he threatened to put the Plaintiff's head through the door glass of the Large TV Room

door, turned around and saw the camera, and then made his statement about getting even by "fucking up" the Plaintiff at a time and place where there were no cameras.

46) That Lieutenant Butts, right there on the spot, informed the Plaintiff that because the Plaintiff was the cause of Oberkramer's retaliatory actions, there would probably be no charges brought against Oberkramer.

47) That Macari voluntarily turned himself in so that no other inmate would be mistakenly charged or even questioned about the actions of a deliberate assault and battery against the Plaintiff. Macari stated this himself in the LT's Office Lobby while the Plaintiff was listening to it from behind the doorway a yard or so away.

48) Macari also made the statement at that same time that he had told the B Unit Team that: "If they let me out of the SHU, I was going to beat the shit out of somebody.".

49) That after being interviewed in the LT's Office and pictures were taken, Oberkramer, Macari, and the Plaintiff were separately taken to the medical department where Nurse Folkwein charted the injuries, did a brief medical interview, and then the three were separately placed in the SHU.

50) That on October 20, 2008, at approximately 21:30 hours (night time count time before lights out), the Plaintiff had difficulty breathing (inhaling especially) and was taken to medical by C/O's Planey and Irwin as they were going off duty. Nurse Folkwein examined

the Plaintiff and determined that the Plaintiff needed a higher level of medical opinion than his level allowed.

51) That Nurse Folkwein was not able to reach the on-call doctor by pager or cell phone, and so he called an administrator of his department who declined to authorize a trip to an outside medical facility, but authorized instead a combination of Tylenol and Motrin for the Plaintiff's pain and breathing difficulties; sending the Plaintiff back to the SHU for the night without a medical doctor's examination, X-rays, or any other form of expert medical consultation. This treatment of the Plaintiff was deliberately indifferent to his medical needs over security concerns and expenses of a hospital trip.

52) That on October 22, 2008, the Plaintiff was taken to Medical for X-rays of his chest. While he was standing there in the hallway after the chest X-rays were done and still in a body chain, cuffed and shackled, the Plaintiff asked Nurse Tompko if haed X-rays were going to be done. He asked the Radiologist who said that there weren't anymore scheduled for the Plaintiff. The Plaintiff then pointed out to Nurse Tompko that the right side of his head was swollen and sore from the battery. He then had NP Zeller examine the Plaintiff and she then ordered a skull series of X-Rays on the spot, which were then done a few minutes later. The Plaintiff never received a full medical examination by an NP, a PA, or a Doctor for his injuries, deliberately indifferent to the Plaintiff's medical needs.

53) That the Plaintiff normally has telephone contact with his family approximately twice a week.

54) That the Plaintiff was not able to tell his family what had happened to him except in the form of a letter which they received approximately ten days after the battery occurred.

55) That on November 10, 2008, the Plaintiff was released from the SHU.

56) That subsequent to the battery, the Plaintiff was afflicted with Tinnitus and went to medical sick call. At his initial consultation for the Tinnitus, the Plaintiff was not charged a medical Co-Pay because it was related to the Battery to him.

57) That on a follow-up sick call visit reporting the Tinnitus, the Plaintiff was charged a $2.00 Co-Pay. The Plaintiff requested that the Co-Pay be refunded to him and has gone through all of the Administrative Procedures regarding the requested refund because it was related to the assault and battery of the Plaintiff, but was denied satisfaction at all levels. The Administrative Remedy Process has failed and now the Plaintiff bring suit for this related issue as well.

58) That the Federal Bureau of Prisons is not crediting inmate's who are charged the $ 2.00 Co-Pay towards the inmate's unpaid Fines and Restitutions as they are mandated to do by the United States Code section which established the $ 2.00 Co-Pay for medical visits and the funds are being removed from inmate trust fund accounts. Where is that money going?

59) That the Plaintiff attempted to submit Administrative Remedy Issues regarding Security Issues concerning Elkton and what happened to the Plaintiff on October 20, 2008, and was told the following things by Captain J. Fitzgerald (some in writing, some not):

A) That she is in charge of Security and that the Plaintiff would not be telling her how to do her job.

B) That what the Plaintiff was filing was leading to a lawsuit and that if he didn't stop she would ship him to an ADX facility, or better yet, to a USP where she knows he will get shanked and probably killed.

C) That yes, there was a policy or procedure in place in the Security Manual which should have prevented what happened to the Plaintiff from happening, putting that in writing so as to make it look like she settled the Plaintiff's Grievance.

D) That Captain Fitzgerald had read the Plaintiff's PSI and didn't care what happened to the Plaintiff at Elkton. This shows deliberate indifference of the head of the Elkton Security Department regarding the Plaintiff's Safety and Security.

60) That Lieutenant Butts had told the Plaintiff in December of 2008 that the assault and battery had been reported to the Federal Bureau of Investigation and that they had chosen not to bring charges against Macari. When the Plaintiff asked Lt. Butts for the local FBI Special Agent in Charge's name and address, the Lieutenant told him that he would have to dig it up and get back with the Plaintiff in a few days. The Lieutenant never did.

61) That the Plaintiff was able to get the address for the Cleveland FBI and began contact with them, requesting that charges be brought against Macari for a hate crime of Aggravated Assault and Battery on Federal Property against a protected person in accordance with the provisions of the United States Code. His request was denied.

62) That the refusal of the FBI to accept the Plaintiff's complaint and case without any investigation is in violation of the mandate by the United States Congress and the section of the United States Code which are the basis for the formation of the FBI.

63) That in February of 2009, the Plaintiff submitted a Federal Tort Claim in the amount of $1,000,000.00 through the Northeast Regional Office of the Federal Bureau of Prisons, which is presently before the United States District Court for the Northern District of Ohio.

64) That the Plaintiff was replaced in the SHU without reason on his Administrative Detention Order on March 5, 2009, and was held there until May 4, 2009, a period of sixty days.

65) That the Plaintiff wrote a letter to the Northeast Regional Counsel, Henry Sadowski, Esq., asking why his Due Process Rights were being violated.

66) That in April of 2009, Captain J. Fitzgerald, while making rounds in the SHU, yelled at the Plaintiff through his door and so loud that the inmates in the surrounding cells could hear clear as a bell: "You want to know why you're in here? You're in here because of the fuckin' Tort Claim you filed! That's why you're in here!" This is further evidence of a violation of both the Plaintiff's Due Process Rights and his Eighth Amendment Rights against Cruel and Unusual Punishment.

67) That the Plaintiff did not find out about the extreme violence in Macari's past until the evening of October 12, 2010.

68) That Attorney General Eric Holder was named as a Co-Defendant by the United States District Court for the

Northern District of Ohio when the Plaintiff filed his Federal Tort Claim for this case, and his Office oversees both the FBI and the FBoP.

69) That under the Theory of Respondeat Superior, Warden JT Shartle is the CEO of Elkton and is ultimately responsible for all of the actions of the employees and staff of Elkton.

70) That in an appointment following the Plaintiff's first release from the SHU around Thanksgiving of 2008, Dr. Lefever of the Elkton Psychology Department told the Plaintiff to buck and that he was safe here at Elkton. She was deliberately indifferent to the Psychological needs of the Plaintiff after the trauma he had experienced approximately a month before.

71) That "Chomo" is prison slang for child molester.

72) That Oberkramer has been involved in physical confrontations/altercations with at least two other "Chomo" inmates that the Plaintiff is aware of since the incident with the Plaintiff, and had a history of violent episodes in the FBoP before he arrived at Elkton from Forest City, Arkansas.

73) That the Plaintiff has been diagnosed with up to 30 percent hearing loss in both ears and has been given two hearing aids, one for each ear. The Government currently pays for Hearing Aid Batteries and Maintenance while the Plaintiff is a federal inmate.

74) That the Plaintiff has been diagnosed with Moderate to Severe Sleep Apnea and was recommended by the Sleep Study Clinic for a Bi-Pap machine but was only authorized for a C-Pap machine by the FBoP Elkton Medical staff because it is a cheaper machine to purchase.

75) That Elkton is overcrowded per the Federal Bureau of Prisons own Program Statement on Rated Capacity and more beds are continuing to be added in the sleeping dormitories.

76) That the overcrowding in the Elkton dormitories is a cause of the stress, tension, and other stress related problems.

77) That the Plaintiff subsequently filed a second Federal Tort Claim for his lost (misplaced) property from the March to May of 2009 trip to the SHU because he filed the first Tort Claim.

Note: The Plaintiff did not lose any personal property from his trip to the SHU after the battery.

78) That the Plaintiff has cause to believe that the named Co-Defendants in the above captioned case have violated his federal Due Process Rights and his Eighth Amendment Right against Cruel and Unusual Punishment under the color of law and in violation of 42 USC § 1983 as applied in the federal context by the United States Supreme Court in Bivens vs Six Unknown Agents.

V. **Relief**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Do not give any legal arguments or cite any cases or statutes.)

1) Request an audit of the Medical Records Department and the Inmate Trust Fund Accounts throughout the Federal Bureau of Prisons to determine why the $2.00 Co-Pays are not being credited to fines and restitution payments as required by law.

2) Charge Captain J. Fitzgerald with Dereliction of Duty and making threats against Government Property (the Plaintiff). Also, personal and professional liability to the Plaintiff in the amount of two years of her gross salary in the BoP.

3) Charge Lieutenant Butts with making false statements and hold him personally and professionally liable in the amount of $75,000.

4) Charge the FBI with Dereliction of Duty and Conspiracy after the fact.

See Attached for rest of relief.

Signed this 19th day of October, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

10/19/10 — Date

/s/ [ILLEGIBLE] — Signature of Plaintiff

5) Request that Nurse Folkwein be reprimanded for not authorizing a hospital trip for an assault and battery victim.

6) Request a refund of the $2.00 Co-Pay, a Reprimand and Retraining of Ms. J. Bunts (along with a thirty day suspension without pay), plus the payment of all court costs and filing fees for this action.

7) That Captain Fitzgerald should also be charged with interfering with Due Process.

8) Charge Ms. Newland with Dereliction of Duty, suspend her without pay for two weeks and send her away for retraining.

9) Charge Inmate Oberkramer with commission and accessory to commission of hate crimes using assault and battery to further the crime.

10) Charge Inmate Macari with First Degree Aggravated Assault and Battery for his premeditated act.

11) Charge those responsible for allowing Macari's release from the SHU with violations of 18 USC § 371, Conspriacy to Commit a premediated act of violence.

12) Lifetime medical attention, including doctors, dentists, hospital bills and equipment and the complete payment of all bills for replacement hearing aids, and all batteries and other related expenses to the Tinnitus and other related medical problems.

13) Correct medical equipment as specified by medical personnel be authorized to the Plaintiff during his lifetime.

14) That the Elkton Security issues be addressed and put into place to avoid more "stairwell" incidents.

15) That Elkton Staff review and correct/change as necessary, security posting assignments, criteria, and specifications.

16) Reduce the number of inmates at Elkton to 2 per cubicle.

17) Answer the Second Tort Claim.

III. Parties C

Name, Employed as, Employed by—

- Federal Bureau of Prisons t/d/b/a Federal Corrections Institution – Elkton, Not Applicable, United States Department of Justice
- Federal Inmate Peter B. Macari, Not Applicable, Not Applicable
- Federal Inmate Roger Oberkramer, Not Applicable, Not Applicable
- Captain J. Fitzgerald, Former Security Captain of FCI-Elkton, Federal Bureau of Prisons (FCI – Ft. Dix, NJ)
- Lieutenant Butts, FCI-Elkton SIS Security Lt., Federal Bureau of Prisons
- Correctional Officer Simmons, Correctional Officer, FCI-Elkton
- Ms. Bunts, FCI-Elkton Health Services Administrator, FCI-Elkton
- Doctor Lefever, former FCI-Elkton Psychology Department Staff Dr., Federal Bureau of Prisons
- Nurse Folkwein, Nurse, FCI-Elkton Medical Staff
- Ms. Newland, FCI-Elkton Unit Case Manager, FCI-Elkton
- Warden J.T. Shartle, Warder, FCI-Elkton (soon to be FCI-Fairton, NJ)
- Attorney General Eric Holder, Attorney General of the United States Department of Justice in Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. 4:10 CV 2404
Judge John R. Adams

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

July 13, 2012

ORDER

This matter appears before the Court following an opinion issued by the Sixth Circuit that reversed, in part, this Court's dismissal of Himmelreich's complaint. Following that opinion, Himmelreich filed a motion requesting that service be performed by the U.S. Marshals Service. However, to the extent that Himmelreich seeks to compel service without completing the forms himself, his request is DENIED.

The Clerk of Courts shall provide Himmelreich the proper forms. Moreover, the Court notes that based upon the Sixth Circuit's opinion, only a limited number of Defendants remain in this matter. Accordingly, only Defendants J. Fitzgerald, Lieutenant Butts, Correctional Office Simmons, Ms. Bunts, and Ms. Newland may be served in this matter. The dismissal of all other Defendants was affirmed and there they will not be served in this matter.

IT IS SO ORDERED.

Date: July 13, 2012

/s/ JOHN R. ADAMS
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
(YOUNGSTOWN)

Docket No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/11/10		Judge John R. Adams assigned to case. (C,BA) (Entered: 02/11/2010)
2/11/10	1	**Complaint** against United States of America. Filing fee not paid, IFP .. Filed by Walter J Himmelreich. Copy to plaintiff. (Attachments: # 1 Exhibits, # 2 Civil Cover Sheet) (C,BA) (Entered: 02/11/2010)
2/11/10		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Pearson. (C,BA) (Entered: 02/11/2010)
2/11/10	2	**Motion**(Certification of Prison Account) to proceed in forma pauperis filed by Plaintiff Walter J Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. (C,BA) (Enteed: 02/11/2010)
3/22/10	3	**Order** granting plaintiff's Motion to proceed in forma pauperis (Related Doc # 2). The prison cashier shall deduct $12.27 from plaintiff's prisoner account. Thereafter, the prison cashier shall deduct 20% of the preceding months income each time the account exceeds $10.00 until the $350.00 filing fee is paid. Judge John R. Adams on 3/22/10.(K,C) (Entered: 03/22/2010)
3/22/10		Copy of 3 Order on Motion to proceed in forma pauperis mailed to Walter J. Himmelreich and the prison cashier on 3/22/10. Related document(s) 3 . (K,C) (Entered: 03/22/2010)
3/31/10		Original Summons, Complaint and Certified Order issued to U.S. Marshall for service upon United States of America. (R,Sh) (Entered: 03/31/2010)
4/21/10	4	Return of Service executed by U.S. Marshal by personal service upon United States of America on 4/20/2010 filed on behalf of Walter J Himmelreich (B,R) (Entered: 04/22/2010)
4/22/10		Partial filing fee in the amount of $12.27 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660036726 (C,BA) (Entered: 04/22/2010)
4/29/10	5	Return of Service executed by U.S. Marshal by Certified Mail upon Bureau of Prisons on 4/21/10 filed on behalf of Walter J Himmelreich (B,R) (Entered: 04/30/2010)
5/3/10	6	Notice *of Appearance* filed by United States of America. (Johnson, Lisa) (Entered: 05/03/2010)
5/5/10	7	Return of Service executed by U.S. Marshal by Certified Mail upon U.S. Attorney General on 4/26/2010 filed on behalf of Walter J Himmelreich (B,R) (Entered: 05/05/2010)
5/13/10		Partial filing fee in the amount of $6.92 received from Walter Himmelreich. Receipt # 14660037190 (C,BA) (Entered: 05/13/2010)
6/7/10		Partial filing fee in the amount of $6.39 received from Walter Himmelreich. Receipt # 14660037633 (C,BA) (Entered: 06/07/2010)
6/10/10	8	Request for Discovery filed by Walter J Himmelreich. (K,K) (Entered: 06/10/2010)
6/16/10	9	**Motion** for extension of time until July 21, 2010 to respond to complaint filed by Defendant United

DATE	DOCKET NUMBER	PROCEEDINGS
		States of America. Related document(s) 1 . (Johnson, Lisa) (Entered: 06/16/2010)
6/18/10	10	**Motion** for temporary restraining order filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Prison Papers)(B,R) (Entered: 06/18/2010)
6/18/10	11	**Order** setting a Telephone Conference for 6/23/2010 at 01:00 PM in Courtroom 575 before Judge John R. Adams and directing the Warden of FCI Elkton to make plaintiff available for the conference. Judge John R. Adams on 6/18/10. (K,C) (Entered: 06/18/2010)
6/21/10	12	**Marginal Entry Order** granting defendant's 9 Motion for Extension of Time to answer. Responsive pleading is due 7/21/10. Judge John R. Adams on 6/21/10.(K,C) (Entered: 06/21/2010)
6/21/10		Copy of 12 Order on Motion for extension of time mailed to Walter Himmelreich on 6/21/10. Related document(s) 12 . (K,C) (Entered: 06/21/2010)
6/22/10	13	**Motion** in limine filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Exhibit)(B,R) (Entered: 06/22/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
6/23/10		**Minutes of proceedings** [non-document] before Judge John R. Adams.Telephone Conference held on 6/23/10. (Court Reporter: None.)Time: 25 mins. (K,C) (Entered: 06/23/2010)
6/24/10	14	**Order and Decision** denying Plaintiff's Motion for a Temporary Restraining Order(Related Doc # 10). See order for details. Judge John R. Adams on 6/24/10.(L, J) Modified text on 6/25/2010 (R,Sh). (Entered: 06/24/2010)
6/24/10	15	**Marginal Entry Order** denying Plaintiff's Motion in limine (Related Doc # 13). Judge John R. Adams on 6/24/10.(L, J) (Entered: 06/24/2010)
6/24/10		Copy of 14 Order on Motion for Temporary Restraining Order, 15 Order on Motion in limine mailed to Walter J Himmelreich, #13152-067, Elkton FCI, P.O. Box 10, Lisbon, OH 44432 on June 24, 2010. Related document(s) 14 , 15 . (L, J) (Entered: 06/24/2010)
6/28/10	16	Letter addressed to Clerk regarding copy requests for subpoenas received after conference date. (R,Sh) (Entered: 06/29/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
7/6/10	17	**Case Management Conference Scheduling Order** with case management conference to be held on 8/19/2010 at 12:00 PM at Courtroom 575 before Judge John R. Adams. Lead counsel and party representives to attend. Judge John R. Adams on 7/6/10. (Attachments: # 1 Report of Parties, # 2 Rule 30.1, # 3 Consent to Magistrate Judge, # 4 Budget, # 5 Policy and Procedure Manual)(K,C) (Entered: 07/06/2010)
7/6/10	18	**Order** directing the Warden of FCI Elkton to make plaintiff available by telephone for the Case Management Conference set for 8/19/10 at 12:00 noon. Judge John R. Adams on 7/2/10. (K,C) (Entered: 07/06/2010)
7/6/10		Copy of 18 Order and 17 Case Management Conference Scheduling Order, mailed to Walter J. Himmelreich on 7/6/10. Related document(s) 18 , 17 . (K,C) (Entered: 07/06/2010)
7/13/10	19	**Motion** to continue *Case Management Conference scheduled for August 19, 2010* until after August 26, 2010 filed by Defendant United States of America. Related docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment(s) 17 . (Johnson, Lisa) Modified text on 7/14/2010 (R,Sh). (Entered: 07/13/2010)
7/21/10	20	**Answer** to 1 Complaint filed by United States of America. (Johnson, Lisa) (Entered: 07/21/2010)
7/22/10	21	Answer to Motion for Continuance filed by Walter J Himmelreich. Related document(s) 19 . (Attachments: # 1 Copies of letter) (B,R) (Entered: 07/22/2010)
7/22/10	22	**Order** granting Motion to continue Case Managment Conference (CMC) (Related Doc # 19) with case management conference to be held on 9/8/2010 at 01:00 PM at Courtroom 575 before Judge John R. Adams. Further, Himmelreich's request to attend the conference in person is denied. Parties are hereby excused from the requirement of preparing a report of parties' planning meeting. Proposed cut off dates shall be addressed during the CMC.. Judge John R. Adams on 7/22/2010.(R,Sh) (Entered: 07/22/2010)
7/23/10		Copy of 22 Order on Motion to continue, mailed to Walter Himmelreich on 7/23/10. Related docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment(s) 22 . (R,Sh) (Entered: 07/23/2010)
7/23/10	23	**Motion** to alter judgment regarding the denial of the request for temporary restraining order and injunctive relief filed by Plaintiff Walter J Himmelreich. Related document(s) 14 . (B,R) Modified text on 7/26/2010 (H,KR). (Entered: 07/23/2010)
7/29/10	24	Response to Answer to Complaint filed by Walter J Himmelreich. Related document(s) 20 . (B,R) (Entered: 07/29/2010)
8/2/10	25	**Marginal Entry Order** denying plaintiff's Motion to alter/amend judgment (Related Doc # 23). Judge John R. Adams on 8/2/10.(K,C) (Entered: 08/02/2010)
8/2/10		Copy of 25 Order on Motion to alter/amend judgment mailed to Walter J. Himmelreich on 8/2/10. Related document(s) 25 . (K,C) (Entered: 08/02/2010)
8/11/10	26	**Order** rescheduling the case management conference to 9/13/2010 at 10:00 AM at Courtroom 575 before Judge John R. Adams. Judge John R. Adams on 8/11/10. (K,C) (Entered: 08/11/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/10		Copy of 26 Order rescheduling CMC mailed to Walter J. Himmelreich on 8/12/2010. Related document(s) 26 . (R,Sh) Copy of order e-mailed to Warden at FCI Elkton on 8/12/10 (K,C). (Entered: 08/12/2010)
8/17/10	27	**NOTICE OF INTERLOCUTORY APPEAL** from the 25 Marginal Entry Order of 8/2/10 denying motion to alter judgment, filed by Walter J Himmelreich. Filing fee not paid. (H,SP) (Entered: 08/18/2010)
9/3/10	28	Acknowledgment from the USCA for Sixth Circuit of receipt of 27 Notice of Interlocutory Appeal (USCA# 10-4052). Date filed in USCA 8/31/10. (H,SP) (Entered: 09/03/2010)
9/13/10		**Minutes of proceedings** [non-document] before Judge John R. Adams.Case Management Conference held on 9/13/10. (Court Reporter: None.)Time: 25 mins. (K,C) (Entered: 09/14/2010)
9/23/10	29	**Order.** The Government is granted leave to file a motion to dismiss. The motion shall be filed no later than October 13, 2010. Plaintiff shall have thirty days to respond to

DATE	DOCKET NUMBER	PROCEEDINGS
		the motion. The Government shall reply within ten days. No discovery shall occur during the pendency of the motion to dismiss. Following resolution of the motion, the Court will set a status conference in the matter if necessary. Judge John R. Adams on 9/23/10. (R,Sh) (Entered: 09/23/2010)
9/23/10		Copy of 29 Order, mailed to Walter Himmelreich on 9/23/10. Related document(s) 29. (R,Sh) (Entered: 09/23/2010)
9/30/10	30	**Order** directing the plaintiff to pay the appeal fee of $455.00 in full or to submit a completed Financial Application within 30 days of this order. (Mailed to plaintiff on 9/30/10) Judge John R. Adams on 9/30/10. (K,C) (Entered: 09/30/2010)
10/13/10	31	**Motion** to dismiss filed by Defendant United States of America. Related document(s) 29 . (Attachments: # 1 Memorandum in Support of Motion to Dismiss, # 2 Declaration of Jason Streeval) (Johnson, Lisa) (Entered: 10/13/2010)
10/19/10	32	**Financial Application** for appeal, filed by Plaintiff Walter J Himmel-

DATE	DOCKET NUMBER	PROCEEDINGS
		reich(Related document(s) 30). (H,SP) (Entered: 10/20/2010)
11/10/10	33	Answer to 31 **Motion** to dismiss filed by Walter J Himmelreich. (B,R) (Entered: 11/10/2010)
11/18/10	34	**Memorandum of Opinion and Order**. Defendant's motion to dismiss is granted and the complaint is hereby dismissed. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith. Judge John R. Adams on 11/18/10. (R,Sh) (Entered: 11/18/2010)
11/18/10	35	**Judgment Entry**. For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, the Government's motion to dismiss is granted and the complaint is hereby dismissed. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Plaintiff may not take an appeal from the Court's decision in good faith. Related document 34 . Judge John R. Adams on 11/18/10. (R,Sh) Modified text on 11/19/2010 (M,TL). (Entered: 11/18/2010)
11/18/10		Copy of 34 Order and Notice of Case Dismissal, 35 Order, mailed to Walter Himmelreich on 11/18/10.

DATE	DOCKET NUMBER	PROCEEDINGS
		Related document(s) 34 , 35 . (R,Sh) (Entered: 11/18/2010)
11/24/10	36	True copy of order from the USCA for the Sixth Circuit: The appeal is dismissed for want of prosecution re 27 . The proper fee was not paid by 11/1/10 (USCA# 10-4052). Date issued by USCA 11/24/10 (H,SP) (Entered: 11/24/2010)
11/30/10	37	**Motion** to alter or amend judgment under Federal Rule of Civil Procedure 59(e) and to reconsider the order of dismissal 34 , 35 filed by Plaintiff Walter J Himmelreich. (B,R) Modified text and created links on 12/1/2010 (P,G). (Entered: 11/30/2010)
12/2/10	38	**Marginal Entry Order** denying Plaintiff's Motion to alter/amend judgment (Related Doc # 37). Judge John R. Adams on 12/2/10. (R,Sh) (Entered: 12/02/2010)
12/2/10		Copy of 38 Order on Motion to alter/amend judgment mailed to Walter Himmelreich on 12/2/10. Related document(s) 38 . (R,Sh) (Entered: 12/02/2010)
12/10/10	39	**NOTICE OF APPEAL** to the 6th Circuit Court of Appeals from the 38 Marginal Entry Order of 12/2/10, filed by Walter J Himmelreich.

DATE	DOCKET NUMBER	PROCEEDINGS
		Filing fee not paid. (H,SP) (Entered: 12/10/2010)
12/23/10	40	Acknowledgment from the USCA for Sixth Circuit of receipt of 39 Notice of Appeal (USCA# 10-4593). Date filed in USCA 12/22/10. (H,SP) (Entered: 12/23/2010)
2/10/11		Partial filing fee in the amount of $8.32 received from Walter Himmelreich. Receipt # 14660042827 (C,BA) (Entered: 02/10/2011)
3/7/11		Partial filing fee in the amount of $5.92 received from Walter Himmelreich. Receipt # 14660043391 (C,BA) (Entered: 03/07/2011)
4/11/11		Partial filing fee in the amount of $3.92 received from Walter Himmelreich. Receipt # 14660044162 (C,BA) (Entered: 04/11/2011)
5/9/11		Partial filing fee in the amount of $6.32 received from Walter Himmelreich. Receipt # 14660044711 (C,BA) (Entered: 05/09/2011)
5/20/11	41	Order of USCA for the Sixth Circuit: Granting appellant's motion to reinstate the appeal re 27 (USCA# 10-4052). Date issued by USCA 5/17/11 (H,SP) (Entered: 05/20/2011)
5/20/11	42	True Copy of order from the USCA for the Sixth Circuit: Dismissing

DATE	DOCKET NUMBER	PROCEEDINGS
		the appeal re 27 , and the motion for leave to proceed in forma pauperis is denied as moot (USCA# 10-4052). Circuit Judges: Batchelder, Kennedy and Sutton. Date issued by USCA 5/19/11 (H,SP). Modified text on 3/7/2012 (H,SP). (Entered: 05/20/2011)
6/13/11		Partial filing fee in the amount of $12.78 received from Walter Himmelreich. Receipt # 14660045496 (C,BA) (Entered: 06/13/2011)
7/11/11		Partial filing fee in the amount of $15.90 received from Walter Himmelreich. Receipt # 14660046099 (C,BA) (Entered: 07/11/2011)
9/6/11	43	**Marginal Entry Order** denying as moot plaintiff's Motion to appeal in forma pauperis (Related Doc # 32). Judge John R. Adams on 9/6/11.(R,Sh) (Entered: 09/06/2011)
10/24/11		Partial Filing fee in the amount of $17.92 received from Walter Himmelreich. Receipt # 14660048279. (C,B) (Entered: 11/08/2011)
1/9/12		Partial filing fee in the amount of $16.18 received from Walter Himmelreich. Receipt # 14660049844 (C,BA) (Entered: 01/09/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
2/9/12		Partial filing fee in the amount of $15.52 received from Walter Himmelreich. Receipt # 14660050575 (C,BA) (Entered: 02/09/2012)
3/7/12	44	True copy of order from the USCA for the Sixth Circuit: The appeal is dismissed for want of prosecution re 39 . The proper fee was not paid by 3/5/12 (USCA# 10-4593). Date issued by USCA 3/6/12 (H,SP) (Entered: 03/07/2012)
4/10/12		Partial filing fee in the amount of $13.92 received from Walter Himmelreich. Receipt # 14660051935 (C,BA) (Entered: 04/10/2012)
6/11/12		Partial filing fee in the amount of $13.57 received from Walter Himmelreich. Receipt # 14660053367 (C,BA) (Entered: 06/11/2012)
7/9/12		Partial Filing fee in the amount of $17.39 received from Walter Himmelreich. Receipt # 14660053939. (C,B) (Entered: 07/24/2012)
7/26/12	45	**Motion** to recall judgment under the provisions of Federal Rule of Civil Procedure 60 (a) (b) (4) and (6) (d) (1) filed by Plaintiff Walter J Himmelreich. (Attachments: # 1 Attachment 1: Documentation Regarding Rule 60)(B,B) (Entered: 07/26/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/7/12		Partial Filing fee in the amount of $14.78 received from Walter Himmelreich. Receipt # 14660054523. (C,B) (Entered: 08/10/2012)
8/9/12	46	**Opposition** to 45 **Motion** to Recall Judgment filed by United States of America. (Attachments: # 1 Exhibit 1—Order 6th Circuit Court of Appeals 5.7.12)(Johnson, Lisa) Modified text on 8/10/2012 (M,TL). (Entered: 08/09/2012)
8/24/12	47	Answer to government's 45 response in opposition to 45 motion to recall judgment filed by Walter J Himmelreich. (Attachments: # 1 Exhibits—Copies of partial orders) (E,P) Modified text, added links and regenerated NEF on 8/27/2012 (M,TL). (Entered: 08/24/2012)
8/30/12	48	**Order** denying Plaintiff's Motion to vacate (recall judgment) (Related Doc # 45). The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith. Judge John R. Adams on 8/30/12.(L,J) Modified text on 8/31/2012 (M,TL). Modified text 9/11/2012 (C,KA). (Entered: 08/30/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/30/12		Copy of 48 Order on Motion to vacate mailed to Walter J. Himmelreich at #13152-067, FCI–Elkton, P.O.Box 10, Lisbon, OH 44432 on 8/30/12. Related document(s) 48 . (L,J) (Entered: 08/30/2012)
9/11/12	49	**NOTICE OF APPEAL** to the Sixth Circuit Court of Appeals from the 48 Order of 8/30/12, filed by Walter J Himmelreich. Filing fee not paid (C,KA). Modified text on 9/12/2012 (H,SP). (Entered: 09/11/2012)
9/13/12	50	**Order** that Plaintiff shall pay the full appeal fee of $455.00 or submit a completed Financial Application to the Court within 30 days of this order. Judge John R. Adams on 9/13/12. (K,C) (Entered: 09/13/2012)
9/13/12		Copy of 50 Order mailed to Walter J. Himmelreich at FCI Elkton on 9/13/12. Related document(s) 50 . (K,C) (Entered: 09/13/2012)
9/13/12		Partial Filing fee in the amount of $14.78 received from Walter Himmelreich. Receipt# 14660055384 (C,B). Modified typo on 9/28/2012 (H,SP). (Entered: 09/18/2012)
9/28/12	51	Acknowledgment from the USCA for Sixth Circuit of receipt of 49

DATE	DOCKET NUMBER	PROCEEDINGS
		Notice of Appeal (USCA# 12-4142). Date filed in USCA 9/26/12. (H,SP) (Entered: 09/28/2012)
9/28/12	52	**Financial Application** for appeal, filed by Plaintiff Walter J Himmelreich(Related document(s) 50). (Attachments: # 1 Inmate Statement) (H,SP) (Entered: 10/01/2012)
10/10/12		Partial filing fee in the amount of $17.39 received from Walter Himmelreich. Receipt # 14660055936 (C,BA) (Entered: 10/10/2012)
10/11/12	53	**Order** granting Plaintiff's Motion to appeal in forma pauperis (Related Doc # 52). The total fee due for this appeal is $455. Further, an initial partial fee in the amount of $15.64 is due and should be deducted from plaintiff's prisoner account, when funds are available therein, until the initial partial fee is paid. Thereafter, the prison cashier's office shall deduct, and forward to the court, 20% of the preceding month's income credited to the prisoner's account each time the amount in the account exceeds $10.00 until the full fee has been paid. Judge John R. Adams on

DATE	DOCKET NUMBER	PROCEEDINGS
		10/11/12.(R,Sh) (Entered: 10/11/2012)
10/11/12		Copy of 53 Order on Motion to appeal in forma pauperis,, mailed to Walter Himmelreich, Elkton Cashier's Office and Clerk, Sixth Circuit Court of Appeals on 10/11/12. Related document(s) 53 . (R,Sh) (Entered: 10/11/2012)
11/14/12		Partial Filing fee in the amount of $14.96 received from Walter Himmelreich. Receipt # 14660056674. (C,B) (Entered: 11/14/2012)
11/20/12		Partial Appeal Fee in the amount of $15.64 received from Walter Himmelreich. Receipt # 14660056787 (S,R) (Entered: 11/20/2012)
12/7/12		Partial Filing fee in the amount of $2.78 received from Walter Himmelreich. Receipt # 14660057218. (C,B) (Entered: 12/14/2012)
12/11/12		Partial Filing fee in the amount of $13.14 received from Walter Himmelreich. Receipt # 14660057262. (C,B) (Entered: 12/11/2012)
1/11/13		Partial filing fee in the amount of $6.18 received from Walter Himmelreich. Receipt # 14660057961 (C,BA) (Entered: 01/11/2013)
1/15/13		Partial filing fee in the amount of $12.41 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660058019 (C,BA) (Entered: 01/15/2013)
3/12/13		Partial filing fee in the amount of $9.92 received from Walter Himmelreich. Receipt # 14660059344 (C,BA) (Entered: 03/12/2013)
4/9/13		Partial filing fee in the amount of $11.12 received from Walter Himmelreich. Receipt # 14660059991 (C,BA) (Entered: 04/09/2013)
5/9/13		Partial filing fee in the amount of $3.92 received from Walter Himmelreich. Receipt # 14660060680 (C,BA) (Entered: 05/09/2013)
5/29/13	54	Information copy of order from the USCA for the Sixth Circuit: Affirming the District Court's order denying the motion for relief from judgment re 49 Notice of Appeal, the motion to stay is denied (USCA# 12-4142). This is not a mandate order. Circuit Judges: Martin, Gilman and Kethledge. Date issued by USCA 5/29/13 (H,SP) (Entered: 05/29/2013)
6/11/13		Partial Filing fee in the amount of $8.49 received from Walter Himmelreich. Receipt # 14660061417. (C,B) (Entered: 06/11/2013)
7/10/13		Partial Filing fee in the amount of $9.39 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660062109. (C,B) (Entered: 07/17/2013)
7/26/13	55	True copy of mandate from the USCA for the Sixth Circuit: Affirming the District Court's order re 49 Notice of Appeal (USCA# 12-4142). Date issued as mandate 7/25/13, Costs: None (Related document 54) (H,SP) (Entered: 07/26/2013)
8/12/13		Partial filing fee in the amount of $4.18 received from Walter Himmelreich. Receipt # 14660062931 (C,BA) (Entered: 08/12/2013)
1/14/14		Partial filing fee in the amount of $7.40 received from Walter Himmelreich. Receipt # 14660066519 (C,BA) (Entered: 01/14/2014)
2/11/14		Partial filing fee in the amount of $12.60 received from Walter Himmelreich. Receipt # 14660067232 (C,BA) (Entered: 02/11/2014)
3/13/14		Partial filing fee in the amount of $10.16 received from Walter Himmelreich. Receipt # 14660068097 (C,BA) (Entered: 03/13/2014)
4/10/14		Partial filing fee in the amount of $11.18 received from Walter Himmelreich. Receipt # 14660068745 (C,BA) (Entered: 04/10/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
5/13/14		Partial filing fee in the amount of $4.00 received from Walter Himmelreich. Receipt # 14660069467 (C,BA) (Entered: 05/13/2014)
6/11/14		Partial Filing fee in the amount of $50.00 received from Walter Himmelreich. Receipt # 14660070131. (C,B) (Entered: 06/16/2014)
7/11/14		Partial filing fee in the amount of $14.90 received from Walter Himmelreich. Receipt # 14660070798 (C,BA) (Entered: 07/11/2014)
8/12/14		Partial filing fee in the amount of $37.76 received from Walter Himmelreich. Receipt # 14660071481 (C,BA) (Entered: 08/12/2014)
9/15/14		Partial filing fee in the amount of $32.32 received from Walter Himmelreich. Receipt # 14660072259 (C,BA) (Entered: 09/15/2014)
10/10/14		Partial Filing fee in the amount of $12.76 received from Walter Himmelreich. Receipt # 14660072826. (C,B) (Entered: 10/24/2014)
11/12/14		Partial filing fee in the amount of $18.08 received from Walter Himmelreich. Receipt # 14660073535 (C,BA) (Entered: 11/12/2014)
12/9/14		Partial filing fee in the amount of $12.20 received from Walter Him-

DATE	DOCKET NUMBER	PROCEEDINGS
		melreich. Receipt # 14660074196 (C,BA) (Entered: 12/09/2014)
1/21/15		Partial filing fee in the amount of $14.08 received from Walter Himmelreich. Receipt # 14660075079 (C,BA) (Entered: 01/21/2015)
2/23/15		Partial filing fee in the amount of $17.32 received from Walter Himmelreich. Receipt # 14660075840 (C,BA) (Entered: 02/23/2015)
3/12/15		Partial filing fee in the amount of $8.24 received from Walter Himmelreich. Receipt # 14660076348 (C,BA) (Entered: 03/12/2015)
4/14/15		Partial filing fee in the amount of $13.01 received from Walter Himmelreich. Receipt # 14660077087 (C,BA) (Entered: 04/14/2015)
5/13/15		Partial filing fee in the amount of $1.52 received from Walter Himmelreich. Receipt # 14660077722. (O,K) (Entered: 05/13/2015)
6/16/15		Partial filing fee in the amount of $8.88 received from Walter Himmelreich. Receipt # 14660078460 (C,BA) (Entered: 06/16/2015)
8/11/15		Partial filing fee in the amount of $30.04 received from Walter Himmelreich. Receipt # 14660079626 (C,BA) (Entered: 08/11/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
8/11/15		Partial filing fee in the amount of $8.88 received from Walter Himmelreich. Receipt # 14660079629 (C,BA) (Entered: 08/11/2015)
9/9/15		Partial filing fee in the amount of $8.58 received from Walter Himmelreich. Receipt # 14660080237 (C,BA) (Entered: 09/09/2015)
10/9/15		Partial filing fee in the amount of $9.44 received from Walter Himmelreich. Receipt # 14660080999 (C,BA) (Entered: 10/09/2015)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV0307

WALTER HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Feb. 11, 2010]

Appeal of Denial of Administrative Tort Claim Number TRT-NER-2009-02319 Under 28 USC § 2672

Now comes the Plaintiff, Walter Himmelreich, Pro Se, and Appeals the Denial of the Administrative Tort Claim (attached) to this Honorable Court and claims that the answers that the Regional Counsel for the Northeast Region of the Federal Bureau of Prisons are in dispute as to their accuracy and validity.

Respectfully submitted,

/s/ WALTER HIMMELREICH
WALTER HIMMELREICH, PRO SE
Federal Register No. 13152-067
Federal Correctional Institution-Elkton
P.O. Box 10
Lisbon, OH 44432

Certification

I, Walter Himmelreich, Pro Se Plaintiff, certify that the above statement is true and correct under penalty of perjury, 28 USC § 1746 and that I am placing this in the FCI-Elkton Prison Legal Mail on February 9, 2010, in accord with the prison mailbox filing rules.

Respectfully,

/s/ WALTER HIMMELREICH
WALTER HIMMELREICH

UNITED STATES GOVERNMENT

Memorandum

Northeast Regional Office, Philadelphia, PA
FEDERAL BUREAU OF PRISONS

DATE : Aug. 10, 2009

REPLY TO ATTN OF : HENRY J. SADOWSKI
Henry J. Sadowski, Regional Counsel

SUBJECT: Administrative Tort Claim No. TRT-NER-2009-02319

TO : Walter Himmelreich, Reg. No. 13152-067
FCI Elkton

Your Administrative Tort Claim No. TRT-NER-2009-02319, properly received by this agency on February 11, 2009, has been considered for settlement as provided by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek $1,000,000.00 for alleged harm caused by an assault you suffered on October 20, 2008 while at the Federal Correctional Institution (FCI) Elkton. Specifically, you allege staff neglect and claim staff were aware the inmate was going to assault you.

After careful review of this claim, I have decided not to offer a settlement. Investigation reveals there is no evidence to suggest your assailant ever told staff he was going to assault you or that staff had any prior knowledge you were going to be assaulted. You received appropriate medical care following the assault, and there is no evidence to suggest you experienced a compensable loss as the result of negligence on the

part of any Bureau of Prisons' employee. Accordingly, your claim is denied.

If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this memorandum.

cc: J. T. Shartle, Warden, FCI Elkton

ACKNOWLEDGMENT OF RECEIPT

DENIAL OF TORT CLAIM

I, Walter Himmelreich, Reg. No. 13152-067, hereby acknowledge receipt of this 14 day of August, 2009, of the August 10, 2009 memorandum from Henry J. Sadowski, Regional Counsel, Northeast Region, Federal Bureau of Prisons, informing me of the denial of my tort claim (TRT-NER-2009-02319).

/s/ ILLEGIBLE
Signature

Witnessed this 14 day of August, 2009.

/s/ ILLEGIBLE
Staff Witness

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Mid-Atlantic Regional Office Legal Department
Customs House, 7th Floor
2nd and Chestnut Streets
Philadelphia, Pennsylvania 19106

2. [illegible] Hundreds

Federal Correctional Institution Elkton
P. O. BOX 10
Lisbon, OH 44432
Unit 6A

3. [illegible] 4. DATE OF BIRTH: March 22, 1972 5. MARITAL STATUS: Single 6. DATE AND DAY OF ACCIDENT: October 28, 2008 (Monday) 7. TIME (A.M. or P.M.): 15:25 PM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

I was intentionally assaulted by inmate Peter Macori after he told staff member(s) that it was his intention. He told the security staff that he had told the Unit Team this intention (within the hearing of the claimant) immediately after the incident while being interviewed within the Lieutenant's Office/Lobby area. See Basis of Claim attached regarding injuries.

PROPERTY DAMAGE

9a. NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

N/A

9b. BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

N/A

PERSONAL INJURY/WRONGFUL DEATH

10. STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See Basis of Claim attached.

WITNESSES

11. NAME	ADDRESS (Number, street, city, State, and Zip Code)
See Bureau of Prisons FCI-Elkton Incident Report and Records	

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
N/A	$1,000,000.00 Bodily Injury plus punitive damages		$1,000,000.00 +

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)

13b. Phone number of signatory: N/A

14. DATE OF CLAIM: February 9, 2009

CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.3

PRIVACY ACT NOTICE

No notice is provided in accordance with the Privacy Act, 5 U.S.C. [illegible]. I consent the information requested in the letter to which this Notice is attached

. Authority: This requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose*: The information requested is to be used in evaluating claims.

C. *Routine Use*: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond*: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Certain regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided satisfactory evidence is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claim for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipt evidencing payment.

(c) In support of claim for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to: Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number ☐ No

N/A

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you ascertain these facts)

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) ☐ No

N/A

SF 95 (Rev. 7-85) BACK

Basis of Claim

On October 29, 2008, at approximately 15:25 PM, during the recall of inmates to their respective housing units, the claimant, Walter T. Himmelreich, was battered and severely beaten in the skull and upper body by inmate Peter Macari. Claimant Himmelreich suffered external injuries from the beating with at least one permanent scar as a daily reminder of the attack. Claimant Himmelreich also suffered internal bruising and swelling and is suffering from a permanent ringing in the ears since the attack. Claimant Himmelreich has also suffered from intermittent headaches, and is currently being treated for a pinched nerve in the area of the body which was battered during the attack. The medical department has also ordered a CT Scan to assess possible nervous system damage. Claimant Himmelreich is also currently waiting to be seen by the dental staff regarding sensitive teeth in the upper left side of his mouth which only became sensitive since the beating. The sensitive teeth are almost directly under the permanent scar. Claimant Himmelreich has also been seen by Drs. Clifford and Lefever (psychology staff) regarding the beating. The medical records will show that Claimant Himmelreich was treated for difficulty breathing approximately 6 hours after the beating, separate from other medical treatment

U.S. DEPARTMENT OF JUSTICE — REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Himmelreich, Walter J (LAST NAME, FIRST, MIDDLE INITIAL) 13152-067 (REG. NO.) BA (UNIT) FCI-Elkton (INSTITUTION)

Part A- INMATE REQUEST

On 10/20/08, I was intentionally physically assaulted by another inmate, who had stated that he would assault (battery) another inmate to staff member(s) prior to the incident. A preventative policy should be in place to safeguard inmates when this situation arises in the future and adhered to. This is a recommendation, suggestion, for the future protection of other inmates, not a directive or order (as previously hinted at in the prior staff response (9½). If a policy is in place, it might be re-evaluated to determine its effectiveness.

December 1, 2008 (DATE) _____ (SIGNATURE OF REQUESTER)

Part B- RESPONSE

Yes there is a policy in place.

_____ Reg # 13152-067

Copy received Feb 4, 2009, 20:55PM. _____

Internally Routed. _____

_____ (DATE) _____ (WARDEN OR REGIONAL DIRECTOR)

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 518482-F1

Part C- RECEIPT CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

2-8-09 (DATE) _____ (RECIPIENT'S SIGNATURE (STAFF MEMBER))

USP LVN

CIVIL COVER SHEET

I. (a) PLAINTIFFS

WALTER HUMMELBEACH

(b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

USA

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

4:10CV0337

JUDGE ADAMS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant; For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury PERSONAL INJURY ☐ 362 Personal Injury - Med. Malpractice ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability		☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 463 Habeas Corpus - Alien Detainee ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/ Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☒ 448 Education	PRISONER PETITIONS ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint

JURY DEMAND ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

I. Civil Categories. (Please check one category only.

1. [x] General Civil
2. [ ] Administrative Review/Social Security
3. [ ] Habeas Corpus Death Penalty

*If under Title 28, §2255, name the SENTENCING JUDGE: _____

CASE NUMBER _____

II. **RELATED OR REFILED CASES.** See LR 3.1 which provides in pertinent part: "If an action is filed or removed to this Court and assigned to a District Judge after which it is discontinued, dismissed or remanded to a State court, and subsequently refiled, it shall be assigned to the same Judge who received the initial case assignment without regard to the place of holding court in which the case was refiled. Counsel or a party without counsel shall be responsible for bringing such cases to the attention of the Court by responding to the questions included on the Civil Cover Sheet."

This action is [ ] RELATED to another PENDING civil case. This action is [ ] REFILED pursuant to LR 3.1.

If applicable, please indicate on page 1 in section VIII, the name of the Judge and case number.

III. In accordance with Local Civil Rule 3.8, actions involving counties in the Eastern Division shall be filed at any of the divisional offices therein. Actions involving counties in the Western Division shall be filed at the Toledo office. For the purpose of determining the proper division, and for statistical reasons, the following information is requested:

ANSWER ONE PARAGRAPH ONLY. ANSWER PARAGRAPHS 1 THRU 3 IN ORDER. UPON FINDING WHICH PARAGRAPH APPLIES TO YOUR CASE, ANSWER IT AND STOP.

(1) **Resident defendant.** If the defendant resides in a county within this District, please set forth the name of such county.

COUNTY:

Definition: For the purpose of answering the above, a corporation is deemed to be a resident of that county in which it has its principal place of business in that district.

(2) **Non-Resident defendant.** If no defendant is a resident of a county in this district, please set forth the county wherein the cause of action arose or the event complained of occurred.

COUNTY:

(3) **Other Cases.** If no defendant is a resident of this district, or if the defendant is a corporation not having a principle place of business within the district, and the cause of action arose or the event complained of occurred outside this district, please set forth the county of the plaintiff's residence.

COUNTY:

The Counties in the Northern District of Ohio are divided into divisions as shown below. After the county is determined in Section III, please check the appropriate division.

EASTERN DIVISION

- [ ] AKRON (Counties: Carroll, Holmes, Portage, Stark, Summit, Tuscarawas and Wayne)
- [ ] CLEVELAND (Counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina and Richland)
- [x] YOUNGSTOWN (Counties: Columbiana, Mahoning and Trumbull)

WESTERN DIVISION

- [ ] TOLEDO (Counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, VanWert, Williams, Wood and Wyandot)

UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 4:10CV0307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA

Oct. 13, 2010

Motion to Dismiss

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendant United States of America hereby moves this Court for an order dismissing this case with prejudice. This Court lacks subject matter jurisdiction over Plaintiff's claims in this case, because Plaintiff's claims fall within the discretionary function exception to the Federal Tort Claims Act. The reasons for this Motion are fully set forth in the attached memorandum in support, which is incorporated herein by reference.

Respectfully submitted

STEVEN M. DETTELBACH
United States Attorney

By: /s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON (0061681)
Assistant U.S. Attorney
Carl B. Stokes United States Court House
801 West Superior Avenue, Suite 400
Cleveland, Ohio 4113-1852
(216) 622-3679
(316) 522-4982 facsimile
E-mail: lisa.hammond.johnson@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2010, a copy of the foregoing ***Motion to Dismiss*** and ***Memorandum in Support*** were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. A copy was also mailed by regular United States mail, postage prepaid, to:

Walter J. Himmelreich, Pro se
#13152-067
Elkton Federal Correctional Inst.
P.O. Box 10
Lisbon, OH 44432

/s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON
Assistant U.S. Attorney

UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Defendant United States of America has moved this Court for an order dismissing this case with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of civil Procedure. This Court lacks subject matter jurisdiction over Plaintiff's claims in this case because Plaintiff's claims fall within the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*

BACKGROUND

Plaintiff Walter J. Himmelreich is a federal inmate currently incarcerated at the Federal Correctional Institution in Elkton, Ohio ("FCI Elkton"). Plaintiff is incarcerated due to his conviction for production of child pornography. (Declaration of Jason Streeval ("Streeval Dec."), ¶ 4.) On October 20, 2008, Plaintiff was assaulted in a stairwell by inmate Peter Macari. (Streeval Dec., ¶ 5.) Plaintiff claims that Macari punched him and kicked him when he was on the

ground. (R. 1-1 Claim For Damage, Injury or Death.) Plaintiff suffered bruising and abrasions on his head, a laceration on his eye and a swollen lip. (R. 1-1 Basis of Claim.) Plaintiff received minor first aid from medical staff. (Streeval Dec., ¶ 5.)

On October 20, 2008, Inmate Macari had been returned to the general population at FCI Elkton after being placed in the Speical Housing Unit for disciplinary infractions. (Streeval Dec., ¶ 5.) Before Macari returned to the general population, he told the Unit Discipline Committee that "I have had a lot of stress here, am not able to live with pedophiles. Also, I am not able to take the right programs here, everything seems to be going against me. If I go back out on the compound, I will smash a pedophile." (Streeval Dec. ¶ 5.)

Plaintiff attached to his complaint a copy of a completed Standard Form 95, Claim for Damage, Injury, or Death, dated February 8, 2009. (R. 1-1). Plaintiff also attached a copy of a memorandum from BOP's regional counsel denying Plaintiff's administrative tort claim, dated August 10, 2009. (R. 1-1.)

In his administrative tort claim, Plaintiff claims that he was "intentionally assaulted by inmate Peter Macari after he told staff member[s] that it was his intention. He told the security staff that he had told the Unit Team of his intention (within the hearing of the claimant) immediately after the incident while being interviewed within the Lieutenant's Official Lobby area." (R. 1-1 at 3.) Plaintiff does not claim that Macari had threatened him before the assault occurred. Plaintiff also does not claim that he told staff about any threats against him before the assault occurred.

Plaintiff also attached a handwritten description of his claim, entitled "Basis of Claim." In that document, Plaintiff states that on October 20, 2008, Plaintiff "was battered and severely beaten in the skull and upper body by inmate Peter Macari." Plaintiff stated that he "suffered external injuries from the beating with at least one permanent scar as a daily reminder of the attack." (R. 1-1 Basis of Claim.)

On February 11, 2010, Plaintiff initiated the instant case by filing an "Appeal of Denial of Administrative Tort Claim TRT-NER-2009-02319 Under 28 USC § 2672." (R. 1 Compl.) In this document, Plaintiff stated that he "[a]ppeals the Denial of the Administrative Tort Claim (attached)" and "claims that the answers that the Regional Counsel for the Northeast Region of the Federal Bureau of Prisons are in dispute as to their accuracy and validity." (R. 1 at 1.)

LAW AND ARGUMENT

I. THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION.

The United States, as sovereign, is immune from suit except as it specifically consents to be sued, and the terms of its consent must be strictly construed. *United States v. Testan*, 424 U.S. 392, 399 (1976). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, is a limited waiver of the government's sovereign immunity. Pursuant to the FTCA, Congress has waived the United States's immunity from suits:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or

> omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The FTCA provides the exclusive remedy for injury or loss of property arising or resulting from the negligent or wrongful act of a government employee. 28 U.S.C. § 2679(b)(1).

However, the waiver of sovereign immunity provided by the FTCA is subject to several exceptoins. The FTCA waiver does not apply to "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *Reetz v. United States*, 224 F.3d 794 (6th Cir. 2000). Because Congress has not waived the sovereign immunity of the United States for claims that fall within the discretionary function exception, federal courts lack subject matter jurisdiction over such claims. *Sharp ex rel. Estate of Sharp v. United States*, 401 F.3d 440, 443 (6th Cir. 2005) ("If the discretionary-function exception applies and Congress has not otherwise waived the United States's immunity, then we lack subject matter jurisdiction over the action.")

The discretionary function exception serves to protect from suit, those "discretionary acts and functions of government" involving policy judgments and decisions. *Rich v. United States*, 119 F.3d 447, 450 (6th Cir. 1997). Conduct covered by the discretionary

function exception is not limited to the policy or planning levels of the Government, but extends to those day-to-day decisions made at an operational level. *See United States v. Gaubert*, 499 U.S. 315, 325 (1991).

In determining whether the discretionary function exception applied to a particular case, courts employ a two-part test articulated by the Supreme Court in *United States v. Gaubert*, 499 U.S. 315, 322 (1991). First, a court must determine whether the employee's decision at issue involved an element of judgment or choice. *Gaubert*, 499 U.S. at 315. "If the answer to that question is 'yes,' then the court must ask 'whether that judgment is the kind that the discretionary function exception was designed to shield.'" *Montez v. United States*, 359 F.3d 392, 395 (6th Cir. 2004) (quoting *Gaubert*, 499 U.S. at 322-23).

"[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). If the government official's choices in the matter involved a matter of discretion, the Supreme Court has held that courts must presume that the government official's decisions are grounded in policy, and thus fall within the discretionary function exception, unless the plaintiff can "allege facts which would support at finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324-35.

II. THE GOVERNING STATUTE AND REGULATIONS ALLOW BOP OFFICALS TO EXERCISE JUDGMENT AND DISCRETION REGARDING PLAINTIFF'S SAFETY.

The BOP staff exercised their discretion and judgment with regard to Plaintiff's safety when they released Inmate Macari from SHU and returned him to general population at FCI Elkton. (Streeval Dec., ¶¶ 3, 6.) In this case, Plaintiff does not specify any statutes that Defendant allegedly violated. However, a statute and several regulations are applicable to the actions at issue in this case. 18 U.S.C. § 4042(a) provides that:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and the regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

The Sixth Circuit has held that, although this statute "imposes and mandatory duty upon the Bureau of Prisons (BOP) through the use of the word 'shall'," that duty "is of a general nature." *Montez*, 359 F.3d at 396. The *Montez* court found that § 4042(a) gives BOP officials no specific guidance in determining how to accomplish the statute's objective of inmate safe-

keeping. Therefore, the court found that the statute provides BOP staff with discretion in determining how best to protect inmates. *Id.* *Accord Cohen v. United States*, 151 F.3d 1338, 1242 (11th Cir. 1998) (BOP's discretion in fulfilling duty to safeguard prisoners triggers the discretionary function exception); *Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997) (same).

BOP's regulations also impose duties upon the agency with regard to disciplinary actions and determining whether or not inmates should be housed in the general population. 28 C.F.R. § 541.10(b) states that:

> The following general principles shall apply in every disciplinary action taken:
>
> . . .
>
> (2) Staff shall take disciplinary action at such times and to the degree necessary to regulate an inmate's behavior within Bureau rules and institution guidelines and to promote a safe and orderly institution environment.

Another regulation that may apply in this case is 28 C.F.R. § 541.22(a), which states that a prison warden "may also place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution. . . . " Finally, 28 C.F.R. § 541.23(a) states that "Staff may consider the following categories of inmates as protection cases. . . . "

The Sixth Circuit has found that, with regard to all of these regulations, "their implementation is left to the discretion of BOP officials." *Montez*, 359 F.3d at

396-97. *Accord Dysktra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796 (8th Cir. 1998) (use of word "may" in these regulations shows that they are discretionary). The language of the regulations, which use the words such as "may" rather than "shall," and "at such times" and "to the degree necessary," clearly give BOP officials discretion to determine how to accomplish the duties imposed by those regulations. *See Dorris v. Absher*, 179 F.3d 420, 429 (6th Cir. 1999) ("The use of the term 'may' in a statute is generally construed as permissive rather than mandatory.") Therefore, the relevant statute and regulations "allowed BOP officials to exercise judgment when making decisions regarding [an inmate's] safety." *Montez*, 359 F.3d at 397.

Because the governing statute and regulations permit BOP staff to exercise judgment and choice, they are presumed to implicate issues of policy under *Gaubert*. Thus, Defendant's actions taken in conformance with those statutes are presumed to fall within the discretionary function exception to the FTCA.

III. PLAINTIFF CANNOT OVERCOME THE PRESUMPTION THAT BOP STAFF'S DECISIONS IN THIS CASE ARE GROUNDED IN POLICY AND ARE OF THE TYPE THAT THE DISCRETIONARY FUNCTION EXCEPTION WAS DESIGNED TO PROTECT.

Staff decisions in this case, particularly the decision to place Inmate Macari in general population, involve consideration of public policy. Courts have found that decisions of corrections officials as to the placement of inmates and the general security provided in a correctional facility implicate public policy, particularly when

prison staff are required to balance various risks and prioritize their limited resources. *Alfrey v. United States*, 276 F.3d 557, 565 (9th Cir. 2002) (BOP's decision not to relocate inmate in response to threats involves balancing risks and "implicate[s] social and public policy considerations.") As the First Circuit aptly states, "The management of large numbers of potentially dangerous individuals within a penal facility inevitably requires not only the exercise of discretion but decisionmaking within the context of various difficult policy choices." *Santana-Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003).

Moreover, the Supreme Court often has noted that broad deference is afforded to the discretion exercised by prison administrators in adopting and executing policies and practices that address the day-to-day problems in operating a correctional institution. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987); *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974). Such decisions necessarily involve balancing limited prison resources with the overriding concern for institutional security. *Turner*, 482 U.S. at 89-90.

Because of the policy issues that inform decisions about inmate safety, courts have consistently held that the discretionary function exception bars suits by federal prisoners for assaults by other inmates. *See, e.g.*, *Montez*, 359 F.3d at 399 (discretionary function exception applied to bar negligence claim by estate of prisoner murdered by another inmate); *Santana-Rosa*, 335 F.3d at 44 (failure to protect inmate from assault

by another inmate barred by discretionary function exception); *Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796 (8th Cir. 1998) (discretionary function exception barred claim that prison officials failed to warn plaintiff that his youthful appearance might make him vulnerable to attacks and failed to place him in protective custody); *Cohen v. United States*, 151 F.3d 1338, 1342-43 (11th Cir. 1998 (discretionary function exception barred claim that prison officials failed to protect inmate from assault by another inmate); *Calderon*, 123 F.3d at 950 (7th Cir. 1997) (discretionary function exception barred claim that prison officials failed to prevent inmate's cell mate from attacking him); *Buchanan v. United States*, 915 F.2d 969, 972 (5th Cir. 1990) (discretionary function exception barred inmate's claim for damages sustained while held hostage by other inmates).

The Sixth Circuit has held that "[a]s a general principle, a complaint that alleges the existence of a specific and immediate threat against an inmate is more likely to survive a motion to dismiss than a complaint that either alleges a nonspecific threat or provides only conclusory statements regarding the existence of a threat." *Montez*, 359 F.3d at 398. In this case, inmate Macari allegedly said that he was going to "smash a pedophile." (Streeval Dec., ¶ 5.) Such a threat is not specific to Plaintiff, especially when between 15 percent and 20 percent of the inmates at FCI Elkton have been convicted of sexual crimes against children. (Streeval Dec., ¶ 6.) Plaintiff did not allege that he had informed staff members of any specific threat made against him before the assault occurred, and there is no record of Plaintiff requesting staff protection before the assault occurred on Oct 20,

2008. (Streeval Dec., ¶ 4.) Thus, Plaintiff's claim fails to provide specific factual allegations necessary to rebut the presumption that Defendant's decisions involved considerations of public policy.

Because the decisions at issue in this case, including the placement of Macari in general population, involve considerations of public policy, they are "of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. Therefore, the discretionary function execption applies and deprives this Court of subject matter jurisdiction over Plaintiff's claims.

CONCLUSION

For all of the foregoing reasons, the discretionary function exception applies to Plaintiff's claims, and this Court lacks subject matter jurisdiction over them. Therefore, this Court should dismiss this case with prejudice, with costs to Plaintiff.

Respectfully submitted

STEVEN M. DETTELBACH
United States Attorney

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CERTIFICATE OF COMPLICANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned counsel certifies that the forgoing Memorandum in Support of Defendant's Motion to Dismiss is twelve (12) pages in length and within the page limitations of a matter assigned to the standard track.

/s/ LISA HAMMOND JOHNSON
LISA HAMMOND JOHNSON
Assistant U.S. Attorney

UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO

Civil Action No.10CV0307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA

DECLARATION OF JASON STREEVAL

I, Jason Streeval, do hereby declare, certify and state as follows:

1. I am currently employed as a Unit Manager by the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI), Elkton, Ohio. I have held this position since October 2007. As Unit Manager at FCI Elkton, I am responsible for, among other things, addressing issues and problems of inmate administration and security which may arise at FCI Elkton. In response to these issues and/or problems, I determine the appropriate course of action to implement. Together with Executive Staff and/or various department heads at FCI Elkton, I review and evaluate security concerns identified and balance competing interests to support the overriding concern for institution security.

2. At FCI Elkton, I serve as the Unit Manager for two housing units and am responsible for supervising a Unit Team of case managers, counselors and the inmates assigned to the housing units. I am familiar with inmate Walter Himmelreich Register No.

13152-067. FCI Elkton maintains an inmate central file for each inmate which contains a variety of information on the inmate to include Presentence Report, Judgment and Commitment Order, disciplinary reports, progress reports and threat assessments (if they exist). A threat assessment is an investigation and evaluation of whether an inmate or staff member is facing a threat from another inmate or group of inmates. A threat assessment is usually initiated by a member of the Unit Team after receiving information from another inmate, staff member or outside source that the safety of another individual is at risk. Maintaining the safety and security of the institution and of inmates and staff who reside and work at the institution is the primary goal of FCI Elkton and each Bureau of Prisons' institution.

3. There are no Bureau of Prisons rules or regulations that dictate the use of threat assessments on inmates who are refusing to return to the compound or general population. Such decisions are made independently by the Unit Team, Captain, or Special Housing Unit (SHU) Lieutenant of each institution, depending on who is supervising the inmate.

4. I have reviewed Plaintiff's central file and did not find any threat assessments conducted prior to October 20, 2008. Plaintiff's instant conviction is for Production of Child Pornography and he has been housed at FCI Elkton since January 23, 2007. Plaintiff had not sought protection from staff prior to the assault on October 20, 2008. In March 2009, there was a threat assessment conducted for Plaintiff that discusses the inmate Assailant, but that was done in March 2009 after Plaintiff complained to staff that

inmates were taking about him. A threat assessment was conducted but because Plaintiff did not name or identify the inmates who were talking about him and because Plaintiff desired to continue to remain in general population, no further action was taken at that time. The Assailant inmate was still housed in the Special Housing Unit (SHU) at FCI Elkton but was pending transfer to another institution. The Assailant is classified as a Separatee of Plaintiff meaning that they will not be housed in the same institution again as long as the Separatee Order exists.

5. Inmates housed in the SHU are being housed there for either administrative detention or disciplinary segregation purposes. On October 14, 2008, the Assailant was housed in Elkton's Special Housing Unit (SHU) in administrative detention when he received a disciplinary incident report for refusing a program assignment. The Assailant refused a direct order to return to the general population at Elkton. On October 16, 2008 the Assailant met with his Unit Discipline Committee regarding the incident report and told them "I have had a lot of stress here, am not able to live with pedophiles. Also, I am not able to take the right programs here, everything seems to be going against me. If I go back out on the compound, I will smash a pedophile." On October 20, 2008, the Assailant was released from SHU and returned to Elkton's general population. That afternoon Plaintiff was returning to his housing unit when the Assailant approached him in the unit stairwell, punched him in the face and then kicked him numerous times when Plaintiff fell to the ground. Once the scene was secured, both inmates were medically assessed by health ser-

vices staff and interviewed by Lieutenants. Plaintiff also received minor first aid from health services staff.

6. In my correctional experience, it is common for inmates to make statements similar to what the Assailant said about pedophiles; talking about violence against pedophiles is a posturing that many inmates take. Within the prison population inmates who have convictions for crimes against children and/or are considered pedophiles, are generally viewed as having the least status among other inmates. Staff weighed what he said but without a more specific threat against a particular inmate or a more specific physical description or situational threat, staff judged he was cleared to go back to general population. Within the last few years, Elkton's population has absorbed an increased number of inmates with convictions for sexual crimes against children. From 2008 to present I would estimate that at least 15-20% of inmates housed at Elkton have a conviction for sexual crimes against children. A statement or threat that an inmate intended to harm a pedophile, without more specific identifying information, usually does not always allow staff to gauge the actual intent or seriousness of an inmate making such a statement. Staff rely on their experience and judgment to gauge the nature and severity of a threat, how likely the inmate is to act on a threat or whether the inmate is making such statements for self-serving reasons. For example, some inmates attempt to manipulate the system to effectuate a transfer to another institution or avoid having to deal with other inmates. Every time we release an inmate from the SHU or transition in newly arrived inmates to the general population, staff assess how the inmate is likely to behave among the other inmates,

however there is always a risk that violence or another institution disruption could occur. In sum, there is no specific regulation or law that was violated by staff using their judgment in this case.

I declare the foregoing is true and correct to the best of my knowledge and belief, and is given under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this 13th Day of Oct. 2010

/s/ JASON STREEVAL
JASON STREEVAL
Unit Manager
Federal Correctional Institution
Elkton Ohio

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Nov. 8, 2010

Plaintiff's Answer to Defendant's Motion to Dismiss

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, in Answer to the Defendant's Motion to Dismiss the above captioned action under Federal Rule of Civil Procedure 12(b)(1) for Lack of Subject Matter Jurisdiction and states that the Plaintiff's claim falls into the Exception (to the Exception (which the Defendant's are claiming causes the Lack of Subject Matter Jurisdiction of the Court)), which the courts have carved out of the Government's Discretionary Function Exception to the Federal Tort Claims Act and avers the following facts and case law for the Court's consideration; and asks this Honorable Court to Dismiss the Defendant's Motion to Dismiss the above captioned action as the Court has jurisdiction:

1) That during the conference call hearing conducted by the Court's Law Clerk in the absence of Judge Adams on September 18, 2010, the Defendant, by and

through their counsel, AUSA Johnson, admitted that the Government does not deny that the Plaintiff was assaulted and battered by another inmate [one Peter B. Macari], but the Government did not know ahead of time that the other inmate was going to do what the Plaintiff alleged that the other inmate said he was going to do.

2) That the Government's Motion to Dismiss includes a Declaration which states that the Government knew before the fact that an assault/battery was going to take place provided that the Government performed certain actions, which they did.

3) That the United States of America admits that the Plaintiff is lawfully under their care and protection under 18 USC § 4042(a)(3).

4) That the United States of America admits that the Plaintiff was Assaulted/Battered by Inmate Peter B Macari on October 20, 2008, in the stairwell leading to the Plaintiff's housing unit as the Plaintiff was returning to his housing unit.

5) That the United States has consented to this suit in equity and that fact is not in dispute.

6) That this suit was filed under the Federal Tort Claims Act (hereinafter FTCA), 28 USC §§ 2671, et seq.

7) That in the case of United States vs Muniz, 374 US 150, 10 LEd2d 805 (1963), the United States Supreme Court held that the FTCA did not prohibit suits against the Federal Government by federal prisoners for injuries which were allegedly received in prison and that Congress specifically (and purposely) failed to

exclude federal prisoners from exclusion provisions of the FTCA.

8) That the clear language of 18 USC § 4042(a)(3) states that:

> "The Bureau of Prisons, under the direction of the Attorney General, **shall**—
>
> (3) provide for the **protection**, instruction, and discipline **of all persons** charged with or convicted of offenses against the United States."

9) That the Supreme Court in the case of Alabama vs Bozeman, 533 US 146, 153, 150 LEd2d 188 (2001), Justice Breyer, in quoting the cases of Anderson vs Yungkau, 329 US 482, 485, 91 LEd 436 (1947), which quoted Escoe vs Zerbst, 295 US 490, 493, 79 LEd 1566 (1935), stated "The word 'shall' is ordinarily 'the language of command'".

10) That according to the Defendant's Memorandum in Support, the Sixth Circuit Court of Appeals in Montez, 359 F3d at 396, has reduced the Supreme Court's determination from the language of command to that "of a general nature".

11) That the Defendant's admit that in one section of the Code of Federal Regulations (541.10(b)) the Government has used the word shall to describe what it is supposed to do; but, in the two sections which they quote as being directly applicable to the Congressional directive of 18 USC § 4042(a)(3), the Department of Justice has lessoned of those sections (541.22(a) and 541.23(a)) by substituting the word may for the word shall, thus violating the intent of Congress and even in violation of the Administrative Procedures Act under 5 USC §§ 700, et seq.

12) That the Supreme Court in Muniz, supra, determined that the federal inmates held in correctional facilities have the right to sue the United States of America for personal injuries they sustain as a result of a government employee's negligence.

13) That a federal inmate's personal property includes his physical body plus what few possessions the federal bureau of prisons allows the inmate to have as creature comforts.

14) That the Supreme Court in Hatahley vs United States, 351 US 173, 100 LEd 1065 (1956), that 28 USC § 2680(a) could not apply since the government agents had not exercised due care in their enforcement of the federal law and had proceeded with "complete disregard" for the property rights of the families; thus negating the discretionary function exception.

15) That in 1974, Congress amended 28 USC § 2680(h) to include a provision that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the FTCA provisions shall apply in assault and battery cases.

16) That in the case of Cohen vs United States, 252 F Supp 679, (ND GA, 1966), the Warden of USP Atlanta described Administrative Segregation as being for "disciplinary purposes, for our protection, and for the protection of others".

17) That the Defendant admits that when the Assailant made the statement of his intentions, he was in the Administrative Segregation area of the Special Housing Unit of FCI-Elkton.

18) That the Defendant was under a contractual obligation to the Plaintiff to protect him as the rules

which the inmate is supposed to follow does not provide for self-protection and therefore the Defendant has breached its direct and implied duties to protect in the same manner as the Government had a duty to safeguard and protect the children in its care in the United States Military Academy's daycare center in the case of Doe vs Scott, 652 F Supp 549, (SD NY, 1987), long before the Plaintiff becamse a federal prisoner.

19) That the Psychology Staff of the Federal Correctional Institution - Elkton did not follow its own Program Statement 5310.12, Psychological Services Manual, Part 2.3, Duty to Warn.

20) That the Duty to Warn part of the Program Statement reads:

> "General guidelines setting forth the conditions necessary for a therapist's duty to warn were established based upon the landmark decision in Tarasoff vs Regents of the University of California (1968). The duty, as defined by the court in the Tarasoff case, arises when a therapist determines that a client presents a serious danger of violence to another. When such a determination is made, the therapist is obligated to use reasonable care to protect the intended victim against such danger. Subsequent court decisions in other states have rendered slightly different opinions on the psychologist's duty to warn."

21) That the Duty to Warn Program Statement also says:

> "Title 18 USC §§ 4243 and 4246 specify that mental health professionals have a duty to rec-

ommend hospitalization, through the federal court system, when an individual, because of mental illness, presents a substantial risk of bodily harm to another person or serious damage to the property of another. The Bureau's Health Services Manual defines "substantial risk" as a belief by treatment staff that the inmate will, if released, commit a violent act within six months."

22) That the Psychological Services Manual Program Statement also says:

"The APA's [American Psychology Association's] Ethical Principles of Psychologists and Code of Conduct also permits the communication of information obtained in a therapy setting when there is clear and imminent danger to an individual or to society."

23) That the Psychology Department of FCI-Elkton, and in particular the staff psychologist(s) who saw the assailant while he was in the Special Housing Unit's (SHU) Administrative Detention section when he made his ominous statements regarding his plans to perform an assault on another inmate in the general population area of the FCI-Elkton compound; in recommending that the assailant be permitted to return to the general population was(were) guilty of reckless disregard for safety.

24) That the FCI-Elkton Law Library Law Dictionary defines reckless disregard for safety as:

"an actor's (q.v.) conduct, if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man (q.v.) to re-

alize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. Sometimes called wanton or willful misconduct. Restatement (Second) of Torts § 500."

25) That the Law Dictionary defines reasonable care or ordinary care as an "imprecise term for the conduct of a reasonably prudent person under similar circumstances.

26) That the Law Dictionary defines negligent conduct as:

"either—

(1) An act which the actor (q.v.) as a reasonable man (q.v.) should recognize as involving an unreasonable risk causing an invasion of an interest of another, or

(2) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do. Restatement (Second) of Torts § 284."

27) That the Warden and Staff of FCI-Elkton were negligent in their conduct when they decided to allow a man whose criminal background included serving time for Attempted First Degree Murder for beating a man over the head with a baseball bat back out onto the General Population Compound of over 1800 inmates, which included approximately fifteen to twenty percent as being potential targets for the inmate that was released from the SHU.

28) That, after the fact, the Plaintiff recommended more security cameras be placed in strategic locations such as stairwells to attempt to prevent future occurrences of this nature and was rebuked by the Captain of Security who told the Plaintiff that she would not be told by an inmate how to run her operation; goes to show that there were inadequate safeguards prior to the assault/battery of the Plaintiff by the assailant and that the Security Department did not care about that issue.

29) That the Warden and the Executive staff did not deem the fact that the housing units are specifically designed for two correctional officers, one for each side of the unit, to be posted in the units for security purposes, and that only one correctional officer is currently posted in each unit to be a security factor (risk) when there are over 300 inmates located in each housing unit.

30) That the Supreme Court said in the case of Sheridan vs United States, 487 US 392, 101 LEd2d 352 (1988): "the negligence of other government employees who had allowed a foreseeable assault or battery to occur might have furnished a basis for liability that was entirely independent of the serviceman's employment status.".

31) That the Government has stated that the FTCA applies "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

32) That each housing unit correctional officer has a set of post orders that they must follow regarding their work responsibilities.

33) That at the time of the Assault/Battery upon the Plaintiff, the regularly assigned correctional officer, Ms. Bourne(Sp?) was not there and Correctional Officer Simmons was her shift replacement for the day.

34) That neither Correctional Officer Simmons nor any of the B-Unit staff were in B-Unit or in the stairwell at the time of the Assault/Battery of the Plaintiff.

35) That there are no cameras or other visual security measures located in the stairwells unless a member of the correctional staff stands in the stairwell area during "open movement" periods.

36) That Correctional Officer Simmons was outside of the A/B Housing Unit smoking a cigarette during the time of the recall of the inmates to their housing units in preparation for the daily 4PM standing count, during which time the Assault/Battery occurred on the B-Unit landing in the stairwell.

37) That in the case of Garza vs United States of America, 161 Fed. Appx. 341, 346 (5th Cir., 2005), the Fifth Circuit Court of Appeals found that the failure of the guard to follow their Specific Post Orders which prescribes a specific set course of action for the post guard (in that case at the Federal Correctional Institution—Three Rivers, Texas) does not bar a cause of action under the discretionary function exception and is therefore in fact an Exception to the Discretionary Function Exception; which gives the Court jurisdiction to hear this case and permits it to go forward.

38) That the Declaration which is attached to the Defendant's Motion to Dismiss is newly discovered evidence which was not available to the Plaintiff at the time of his filing with the Federal Bureau of Prisons. That along with the fact that the Plaintiff was placed in Administrative Segregation from March 5, 2009 until May 4, 2009, because he filed this Tort Claim are the reasons that the Plaintiff is now asking the Court under the provisions of 28 USC § 2675(b) to add the amount of three million dollars ($3,000,000.00) to the amount of the original claim as treble damages for harassment, withholding evidence, psychological stress, and pecuniary damages.

39) That Program Statement ELK 1640.04F is the smoking regulations.

WHEREFORE, the Plaintiff, Walter J. Himmelreich, Pro Se, hereby requests that this Honorable Court Order that the Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) for Lack of Subject Matter Jurisdiction be Ordered to be Dismissed because the action before the Court falls into that which has been determined by the courts to be an exception to the Discretionary Function Exception of 28 USC § 2680(a) because the correctional officer on duty at the time was not following his specific post's order and was outside of the housing unit area smoking a cigarette at the time that the Plaintiff was being assaulted/battered by another inmate on the stairwell landing of the housing unit, and that other proximal causes of negligence by the facility staff before the incident contributed to the reckless disregard for safety and negligent conduct which allowed the incident to happen.

Dated: Nov. 8, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432

Certification

I, Walter J. Himmelreich, Pro Se Plaintiff in the above captioned action before the Court hereby swear under the Penalty of Perjury, 28 USC § 1746, that the above is true and correct. I furthermore swear that I will be placing the same in the FCI-Elkton Prison Legal Mail on or before November 12, 2010, as a timely filing and will include a copy for AUSA Johnson and a return copy for myself along with postage prepaid envelopes, using the Prison Mailbox Filing Rule.
Dated: Nov. 8, 2010

Respectfully,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Nov. 28, 2010

Motion to Alter or Amend Judgment in the Above Captioned Case Under Federal Rule of Civil Procedure 59(e) and to Reconsider the Order of Dismissal Considering the Fact That the Correctional Officer Not Following His Post Orders Fails the Second Prong of the Gaubert Test Thereby Disallowing the Dismissal Under the Discretionary Function Exception and Giving the Court Subject Matter Jurisdiction Over This Action

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Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, to Request of this Honorable Court that it Alter or Amend the Judgment Causing the Dismissal of the above captioned case on November 18, 2010, since the Court failed to properly consider the facts of the case as presented in the Plaintiff's Response to the Defendant's Motion to Dismiss for Lack of Jurisdiction (especially the fact that the Posted Correctional Officer was not following his Post Orders when he abandoned his post of duty to smoke a cigarette at the time that he was supposed to be visible in his post area),

under Federal Rule of Civil Procedure 59(e); and that an Evidentiary Hearing should have been Ordered by the Court before it Prematurely Dismissed the above captioned action since the cause is actionable because the Government's Discretionary Function Exception does not apply in the case at hand; the same as was found by the United States Court of Appeals for the Fifth Circuit in the only other case of the same nature as the case before the Court being the Exception to the Discretionary Function Exception, thus making the United States liable, averring the following:

1) That the District Court's Memorandum aND Order was issued before the Defendant's Response to the Plaintiff's Answer to the Defendant's Motion to Dismiss was filed as was required by the Court in its scheduling Order, therefore denying the Plaintiff the opportunity to see what the Defendant's response would have been.

2) That the District Court's Memorandum and Order was written on November 18, 2010, was mailed out by the Clerk of the Court's Office on November 19, 2010, and was received by the Plaintiff in the FCI-Elkton General Mail Call on November 24, 2010 at 16:45 PM.

3) That the Plaintiff's Response to the Defendant's Motion to Dismiss and the related Biven's Action before the Court show that the Biven's Action is dealing with the issue of culpability on the part of the Defendant(s) for violating the Plaintiff's Civil Rights for releasing the assailant from the SHU after the assailant's threats were not taken seriously by the staff and the above captioned Federal Tort Claim is dealing with

the attack itself and the correctional officer's failure to follow post orders.

4) That the United States Supreme Court in Haines vs Kerner (citation omitted) instructed that a Pro Se Plaintiff's pleadings must be construed liberally and that the Pro Se Plaintiff is not supposed to be held to the same high standard as a professionally trained and licensed legal counsel.

5) That the Plaintiff's original filing with the Court only stated that there was a disagreement with the findings of the Federal Bureau of Prisons in their response to his Federal Tort Claim filing at the Agency level which the Court must adjudicate.

6) That the Plaintiff's Response to the Defendant's Motion to Dismiss for Lack of Jurisdiction addressed the fact that the failure of the correctional officer on duty at the B Unit post at the time of the assault and battery to follow the post orders (by essentially abandoning his post of duty by going outside of the unit and taking a smoke break during the recall of inmates to the housing units in preparation of taking the mandatory daily 4 PM stand-up count (which is one of the busiest moves on the compound of the day)) is a situation which is **not covered by the Discretionary Function Exception** of the Government which is written into the Federal Tort Claim Act, 28 USC §§ 2671, et seq..

7) That the Plaintiff's Response to the Defendant's Motoin to Dismiss cited the only other case law which involves the Federal Bureau of Prisons and an inmate being assaulted by (an)other inmate(s) when the correctional officer fails to follow their post orders and the assaulted (battered) inmate files a Federal Tort

Claim and the Government claims Lack of Jurisdiction because of the Discretionary Function Exception. See Garza vs United States, 2007 US District Lexis 17097 (USDC SDTX, 2007), applying the remand of Garza vs United States of America, 161 Fed Appx 341, 345-346 (5th Cir., 2005).

8) That the Court has glossed over and failed to mention in its Memorandum and Order that these facts were brought to the Court's attention by the Plaintiff in his Response to the Defendant's Motion to Dismiss, especially regarding the fact that the correctional officer was not following his post orders when he took the smoke break.

9) That the Court should have Ordered an Evidentiary Hearing to determine the validity and truth of the allegation that the post orders were not being followed by the correctional officer at the time of the assault and battery of the Plaintiff by the assailant.

10) That the Defendant(s) has videotape evidence which it has failed to release to the Plaintiff which conclusively shows that the allegation of the Plaintiff regarding the smoke break by the correctional officer who was supposed to be on duty at the post at the time of the assault and battery from the "Eye in the Sky" camera overlooking the compound yard.

11) That it is the Court's obligation to dispense justice fairly and properly under the law and to correct any errors in judgment that it makes or that is made by court personnel in that dispensation of justice.

12) That the Court noted in its Memorandum and Order's facts section regarding the Plaintiff's claim filing with the Court that:

"Himmelreich contends that the Government failed to protect him from an assault perpetrated by another inmate."

The Plaintiff does not dispute that finding of fact. The Plaintiff does dispute the fact that the Court did not look beyond the assumed argument that the Plaintiff complained that the Government released the assailant from the SHU after he made his threat and follow through to the fact that the correctional officer was at fault for not following his post orders.

13) That the correctional officer on duty in B Unit at the time of the assault and battery failed to protect the Plaintiff from the assault and battery when he abandoned his post.

14) That there were no other correctional staff located in B Unit during the time that the assault and battery of the Plaintiff occurred, even though the Bureau of Prisons has five other full time staff members permanently assigned to B Unit (2 counselors, 2 case managers, and a unit secretary) as well as a Unit Manager who is shared with the other unit located in the same housing building.

15) That the Memorandum and Order of the Court should be voided and an Evidentiary Hearing on the facts should be held regarding the issue of whether or not the correctional officer was following his post orders when he was outside of the unit he was posted to; when there were no other members of the staff on duty in the unit at the time; and when the change of shift was within the hour of the inmate move.

16) That if the Court refuses to grant the relief requested above, the the Plaintiff respectfully requests

that the Court construe this motion as a Notice of Appeal timely filed for the reasons as stated in this motion.

WHEREFORE, the Plaintiff, Walter J. Himmelreich, Pro Se, hereby requests that this Honorable Court under Federal Rule of Civil Procedure 59(e) Alter or Amend its Memorandum and Order of November 18, 2010, Dismissing the Plaintiff's Federal Tort Claim for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1), in light of the facts which the Court failed to consider and which have been directly adjudicated by case law and Void that same said Memorandum and Order of Dismissal; Schedule an Evidentiary Hearing to verify the facts as presented to the Court; or, should the Court decline to do this request, to Reconstrue this Motion for Relief as a timely filed Notice of Appeal.

Dated: Nov. 28, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432

Certification

I, Walter J. Himmelreich, Pro Se, do hereby swear that the above statements are true and correct to the best of my knowledge and abilities under the Penalty of False Statements and Perjury, 28 USC § 1746. I furthermore solemnly swear that I will be placing the same along with the appropriate copies in the

FCI-Elkton Prison Legal Mail on November 29, 2010, in accordance with the mailbox filing rule of Houston vs Lack.

Dated: Nov. 28, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH

WALTER J. HIMMELREICH, PRO SE
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dec. 8, 2010

Notice of Appeal

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, to Appeal the District Court's Denial Without Opinion of the Plaintiff's Motion to Alter or Amend Judgment under Federal Rule of Civil Procedure 59(e) as the District Court had Subject Matter Jurisdiction over the above captioned case and the Discretionary Function of the Federal Tort Claims Act, 28 USC §§ 2671, et seq.; as stated in the prior brief of the Plaintiff and the Motion to Alter or Amend Judgment does not apply in this case. The Motion to Alter or Amend Judgment also clearly stated that should the District Court deny the Motion to Alter or Amend Judgment that it should also be considered as a Notice of Appeal, negating the need for this filing. The District Clerk filed the Denial of the Motion on November 30, 2010, and mailed it out on December 2, 2010, and the Plaintiff received his copy on December 7, 2010, at the FCI_Elkton General Population mail call at 4:25 PM.

When a correctional officer essentially abandons his post of duty, whether he be working in a local, state, federal, or privately run prison, allowing for the assault and battery of one inmate by another, then the cause is actionable and not exempted under the discretionary function exception of the tort claims act.

Dated: Dec. 8, 2010

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
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Lisbon, OH 44432

Certification

I hereby certify that the above statements are true and correct and that I will be placing this and the appropriate copies in the FCI-Elkton Legal Mail System on December 9, 2010. 28 USC § 1746.

Dated: Dec. 8, 2010

/s/ [ILLEGIBLE]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10-cv-00307-JRA

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT(S)

Jul. 23, 2012

Motion to Recall Judgment Under the Provisions of Federal Rule of Civil Procedure 60, §§ (a), (b)(4) and (6), (d)(1)

Now comes the Plaintiff, Walter J. Himmelreich, Pro Se, and humbly requests that this Honorable Court Recall its Judgment of Dismissal of the Federal Tort Claim which is the subject of the above captioned action before the Court; which the Court dismissed under Federal Rule of Civil Procedure 12(b)(1) for Lack of Jurisdiction; and avers the following in support thereof:

1) That the Court previously dismissed the above captioned action for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1) upon the request of the Government

2) That the Plaintiff argued that there was merit to the claim and that the action should not be dismissed for Lack of Jurisdiction in accordance with the caselaw on the subject.

3) That since the Order of Dismissal by this Court, there has been new evidence in the form of an ORDER from the Sixth Circuit Court of Appeals in the sister BIVENS action filed in this Court to Docket Number 4:10-cv-02404-JRA (Appeal Number 11-3474) in Footnote 1, states that Negligence on the part of the Government was involved in the cause of this action before the Court.

4) That the Seventh Circuit Court of Appeals found in the case of Doe vs US, 833 F2d 220 (7th Cir., Ill, 1988) that where the Government affirmatively assumes the duty to protect a person prior to and independent of that person being assaulted and that duty to protect is breached leading to an assault on that person that the Government is required to protect, whether or not it is by a Government employee or another, a Federal Tort Claim arises out of the Government's negligence and 28 USC § 2680(h) does not bar a cause of action.

5) That in Gibson vs United States, 457 F2d 1392 (3rd Cir., NJ, 1972), a Federal Tort Claim was allowed because there was a foreseeable consequence from the Government's failure to exercise due care in its responsibilities.

6) In Nguyen vs United States, 556 F3d 1244 (11th Cir., Fl, 2009), determined that the 1974 change to the sovereign immunity waiver makes the Government liable in this case and states:

> "That year Congress amended the statute by adding an important proviso to § 2680(h), which turned that subsection around as to specified

claims against federal investigative and law enforcement officers. See Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (1974). Instead of excepting those claims from the waiver of sovereign immunity, as the subsection originally had, the proviso included them within the waiver. The specified claims are "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" based on acts "of investigative or law enforcement officers of the United States . . . ." Id. As amended, § 2680(h) now reads in its entirety:

> The provision of this chapter and section 1346(b) [the general waiver of sovereign immunity] of this title shall not apply to—***(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regards to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 USC

§ 2680(h), the "date of the enactment of this proviso" was March 16, 1974, See § 2, 88 Stat. at 50.

The straightforward meaning of subsection (h) as it now reads is that the United States has expressly waived its sovereign immunity for the claims listed in the proviso, which includes the claims made in this case."

7) That the Discretionary Function Exception which the Government argued in its case in point with the AFFIDAVIT of Unit Manager Streeval, the legal lisason for FCI-Elkton at the time, shows the NEGLIGENCE found the Sixth Circuit Court of Appeals which permits the Plaintiff the ability to file the Federal Tort Claim which he did file in the first place.

8) That the Plaintiff did argue that there is an exception to the Government's claimed Discretionary Function Exception, and which this Court dismissed when it ruled in the Government's favor by Dismissing the Federal Tort Claim filing of the Plaintiff for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

9) That the Eleventh Circuit showed by the Canon of Statutory Construction that the proviso of 28 USC § 2680(h) (which is applicable in this case before the Court) trumps the Discretionary Function Exception of 28 USC § 2680(a), as was the intent of the United States Congress in 1974 when they wrote it. See Nguyen, 556 F3d at 1252-1259.

10) That the United States District Court for the Southern District of New York, in 1987, denied the dismissal of the Tort Claim to the Government based on the fact that the United States breached its affirmative duty to protect in Doe vs Scott, 652 F Supp 549.

11) That the Plaintiff is also still raising the issue of the harassment of the Government in instigating the dismissal of the Federal Tort Claim for $1,000,000.00 when it admitted the wrongdoing of its employees in the Affidavit and then still said that the Discretionary Function Exception trumped the proviso of 28 USC § 2680(h). The Plaintiff renews his request for treble damages of $3,000,000.00 for this harassment as punitive and punitive damages.

WHEREFORE, the Plaintiff, Walter J. Himmelreich, Pro Se, does hereby request that this Honorable Court Recall its judgment in regards to the Federal Tort Claim in the above captioned action.

The Plaintiff further requests that the amount of the Federal Tort Claim for the purposes of this litigation be understood to be a base amount as filed with the Administrative Agency of $1,000,000.00, and the previously requested $3,000,000.00 for harassment and damages against the Defendant(s) which are both punitive and putative; in accord with the Federal Case Law regarding Federal Tort Claims.

Dated: Jul. 23, 2012

Respectfully submitted,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH, PRO SE
Federal Register # 13152-067
Federal Correctional Institution - Elkton
P.O. Box 10 Unit BA
Lisbon, OH 44432-0010

Certification

I, Walter J. Himmelreich, Pro Se, the Plaintiff in the above captioned action, does hereby swear and affirm that the foregoing statements are true and correct, to the best of my limited knowledge so to state, and under the Penalty of Perjury, 28 USC § 1746. I furthermore swear that I will be placing the same in the FCI-Elkton Prison Legal Mail System on July 24, 2012, in accord with the Prison Legal Mailbox Rule of the Supreme Court in Houston vs Lack, along with a copy to stamp in and return to the Plaintiff and a copy for AUSA Heather Tonsing Velosin, Esquire, the legal counsel of record for the Defendant(s), and the proper postage prepaid envelopes.

Dated: July 23, 2012

Respectfully,

/s/ WALTER J. HIMMELREICH
WALTER J. HIMMELREICH
Federal Register # 13152-067
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Rule 60. Relief from a Judgment or Order

(a) **Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidenct that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacted; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) **Timing and Effect of the Motion.**

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) **Other Powers to Grant Relief.** This does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) **Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(Amended March 19, 1948; Oct. 20, 1949; Aug. 1, 1987; Dec. 1, 2007.)

No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented is:

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners are Jermaine Simmons and Brian Butts.

Respondent is Walter J. Himmelreich.

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1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* (2013) 5

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In the Supreme Court of the United States

No. 15-109

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App 1a-10a) is reported at 766 F.3d 576. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2014. A petition for rehearing en banc was denied on March 10, 2015 (Pet. App. 11a-12a). On May 22, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 23, 2015, and the petition was filed on that date. The petition was granted on November 6, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

This case involves the proper interpretation of the Federal Tort Claims Act (FTCA) judgment bar, 28 U.S.C. 2676. That provision states that "the judgment" in an FTCA action "shall constitute a complete bar" to "any action" by the same plaintiff against the government employee allegedly responsible for the tort. *Ibid.* Respondent's prior FTCA action against the United States was dismissed in a final judgment pursuant to 28 U.S.C. 2680(a), which exempts the United States from liability for claims involving certain discretionary governmental functions. Pet. App. 47a-56a. In this case, the district court relied on the judgment bar to dismiss respondent's Eighth Amendment *Bivens* claim against petitioners. *Id.* at 20a-22a. The court of appeals reversed, concluding that the judgment bar's reference to "judgment" does not encompass FTCA judgments of dismissal pursuant to Section 2680. *Id.* at 5a-8a.

A. The Legal Background

The FTCA waives the United States' sovereign immunity for claims for money damages arising out of torts committed by federal employees. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). Before the FTCA became law, parties injured by federal employees were forced to seek relief through private bills in Congress or by suing the employee in his individual capacity. See *Dalehite* v. *United States*, 346 U.S. 15, 24-25 & n.9 (1953); see also *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954). Such individual-capacity suits constituted "a very real attack upon the morale of the services," because most government employees were "not in a position to stand or defend large damage suits." *Gilman*, 347

U.S. at 512 n.2 (quoting *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 9 (1942) (statement of Assistant Attorney General Francis M. Shea) (*1942 Hearing*)). The suits also imposed a significant burden on government resources, because "the Government, through the Department of Justice, [wa]s constantly being called on * * * to go in and defend" federal employees from suit. *Ibid.*

In 1946, Congress enacted the FTCA out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24-25. In the FTCA, Congress "waived sovereign immunity from suit for certain specified torts of federal employees." *Id.* at 17. At the same time, however, Congress placed limits on the United States' waiver of its immunity, as well as on the scope of the United States' substantive liability. The FTCA therefore does "not assure injured persons damages for all injuries caused by such employees." *Ibid.*

1. Section 1346(b) is the FTCA's jurisdictional provision. It waives the United States' sovereign immunity by granting the district courts "exclusive jurisdiction" over certain classes of tort claims against the United States. 28 U.S.C. 1346(b)(1). Specifically, Section 1346(b) provides that

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within

> the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Ibid.

2. Chapter 171 of Title 28 of the United States Code contains various procedural and liability provisions of the FTCA. Within that chapter, Section 2674 sets forth the "Liability of United States." 28 U.S.C. 2674. Subject to certain qualifications, it states that "[t]he United States shall be liable" for tort claims "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." *Ibid.*

Section 2680 of Chapter 171 enumerates several exceptions to the jurisdiction and liability provisions of the FTCA. Section 2680 states that "[t]he provisions of [Chapter 171]" and of "section 1346(b)" "shall not apply" to the categories of claims set forth in its list of exceptions. One such category encompasses any claim based upon a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a).

This Court has repeatedly recognized that Section 2680's exceptions establish "substantive limitations" on the United States' FTCA liability. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955); see, *e.g.*, *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013); pp. 34-35, *infra* (discussing cases). At the same time, however, those exceptions also limit the FTCA's waiver of sovereign immunity and thus limit the subject-matter jurisdiction of district courts. See 28 U.S.C.

2680 (noting that Section 1346(b)'s jurisdictional grant "shall not apply" to claims based on the exceptions); *Dalehite*, 346 U.S. at 24, 31 & n.25 (treating Section 2680 exceptions as limits on "jurisdiction").[1]

3. This case turns on the meaning and application of the FTCA judgment bar, 28 U.S.C. 2676. That provision states that

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Ibid. Once an FTCA action is the subject of a judgment, the judgment bar cuts off the claimant's ability to pursue other avenues of relief, based on the same underlying facts, against government employees.

The judgment bar plays an important role in the FTCA's remedial scheme. The FTCA grants plaintiffs the right to sue a financially responsible defendant, subject to the limits and exceptions Congress placed on the government's liability. But by enacting the judgment bar, Congress also ensured that, if a claimant chose to pursue an FTCA action against the United States, the judgment in that suit would both protect federal employees against the threat and distrac-

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[1] See also, *e.g.*, *Domme* v. *United States*, 61 F.3d 787, 789 (10th Cir. 1995); *Richardson* v. *United States*, 943 F.2d 1107, 1113 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Sowell* v. *United States*, 835 F.2d 1133, 1135 (5th Cir. 1988); *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822, 823 (2d Cir. 1985); Br. in Opp. 35 (agreeing that Section 2680 exceptions are "jurisdictional in nature"); but see *Williams* v. *Fleming*, 597 F.3d 820, 823-824 (7th Cir. 2010); see generally 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 7.01[2], at 7-7 (2013).

tion of litigation and relieve the government from the burden of defending multiple actions arising out of the same incident. This Court has thus described the judgment bar's core purpose as being "to save trouble for the Government and its employees" by "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Will* v. *Hallock*, 546 U.S. 345, 353-354 (2006) (quoting 18C Charles Alan Wright et al., *Federal Practice and Procedure* § 4402, at 9 (2d ed. 2002) (*Federal Practice & Procedure*)).

4. At the time Congress enacted the FTCA, the judgment bar's main function was to bar state-law tort claims filed against federal employees in state court. In 1971, this Court decided *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which recognized a limited constitutional tort cause of action against federal officers and employees in their personal capacity. *Id.* at 395-397. It is well established that the judgment bar can foreclose a subsequent *Bivens* action based on the same underlying facts.[2]

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[2] See 28 U.S.C. 2676 (stating that prior judgment bars "*any* action by the claimant" arising out of the same subject matter) (emphasis added); see also, *e.g.*, *Unus* v. *Kane*, 565 F.3d 103, 121-122 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010); *Farmer* v. *Perrill*, 275 F.3d 958, 963-965 (10th Cir. 2001); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437-1438 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra* v. *Pichardo*, 786 F.2d 237, 241-242 (6th Cir.), cert. denied, 479 U.S. 826 (1986); see *Hallock* v. *Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), vacated by *sub nom. Will* v. *Hallock*, 546 U.S. 345 (2006).

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act. That statute makes the FTCA the "exclusive" remedy for any injury arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 2679(b)(1). The Westfall Act expressly "preclude[s]" state-tort claims against federal employees in their individual capacity arising from such injuries, *ibid.*, and it provides for the prompt substitution of the United States as the defendant in the employee's place on such claims, 28 U.S.C. 2679(d)(1). The Act's exclusive-remedy provisions do not apply, however, to civil actions brought against such employees for violations of the Constitution (*i.e.*, *Bivens* claims) or other federal statutes apart from the FTCA. See 28 U.S.C. 2679(b)(2). In light of the Westfall Act's restrictions on state-tort suits directly against federal employees, the judgment bar now primarily functions as a bar to *Bivens* actions.

B. The Present Controversy

Respondent is a federal inmate at the Federal Correctional Institution (FCI) in Danbury, Connecticut. He is serving a 240-month sentence for production of child pornography, in violation of 18 U.S.C. 2251(b). J.A. 105; Pet. C.A. Br. 2. Respondent asserts that in October 2008, while serving his sentence at the FCI in Elkton, Ohio, he was assaulted by another inmate at the prison. J.A. 49-51. Respondent alleges that petitioners, who are staff members at FCI Elkton, were on notice that the other inmate intended to attack him, and that they nonetheless placed him in the general

prison population where he would be exposed to the attack. Pet. App. 34a, 48a.

1. In February 2010, respondent filed an FTCA action against the United States, based on the 2008 assault, in federal district court. J.A. 67, 91-101. In October 2010, he filed this case as a separate *Bivens* action against petitioners (along with various other defendants who are not parties in this case). J.A. 7. Respondent alleged (among other things) that petitioners' actions in connection with the assault violated the Eighth Amendment. J.A. 58.

The United States moved to dismiss the FTCA action, with prejudice, pursuant to the FTCA's discretionary-function exception, 28 U.S.C. 2680(a). J.A. 102-116. In November 2010, the district court dismissed that action. Pet. App 47a-54a. The court explained that decisions by prison officials regarding inmate safety generally involve the exercise of judgment. *Id.* at 49a-50a. It noted that respondent had not alleged that petitioners were aware of any threats directed specifically at him, and it emphasized that petitioners had made a "policy decision" to house respondent in the general population based on the absence of any specific threat against him. *Id.* at 52a-53a. The court also explained that Section 2680(a) is an exception to the FTCA's general waiver of sovereign immunity from tort claims against the United States, and that the court therefore "lacks subject matter jurisdiction over acts falling within the discretionary function exception." *Id.* at 49a. On November 18, 2010, the court formally issued a document—entitled "JUDGMENT ENTRY"—declaring that it was "ORDERED, ADJUDGED and

DECREED" that the case was dismissed. *Id.* at 55a-56a.[3]

2. In March 2011, the district court dismissed respondent's separate *Bivens* suit under 28 U.S.C. 1915(e) for failure to state a claim. Pet. App. 34a-46a. In May 2012, the court of appeals remanded respondent's Eighth Amendment claim, which alleged that the individual defendants had failed to protect respondent from the inmate-on-inmate assault. *Id.* at 29a-31a.[4]

On remand, the district court granted the government's motion for summary judgment on the Eighth Amendment claim on two alternative grounds: (1) respondent's failure to exhaust his administrative remedies within the prison grievance process, and (2) the judgment bar. Pet. App. 18a-22a. As to the latter, the court explained that the judgment bar "applies to all judgments" in FTCA actions, including those dismissing a case "because the actions in controversy f[a]ll under the discretionary exception to the FTCA

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[3] Respondent subsequently filed a motion asking the district court to alter or amend the judgment and to reconsider the dismissal of his FTCA claim. J.A. 133-139. The court denied that motion, and respondent's subsequent appeal was eventually dismissed by the court of appeals for failure to prosecute. J.A. 78; Pet. App. 57a-58a. In July 2012, respondent filed a motion asking the district court to recall the judgment. J.A. 142-147. The court denied that motion, Pet. App. 59a-61a, and the court of appeals affirmed, *id.* at 62a-64a.

[4] The court of appeals also remanded a *Bivens* claim that respondent had brought under the First Amendment. Pet. App. 27a-28a. Respondent's First Amendment claim remains pending in the district court, and it is not at issue here. See *id.* at 17a-18a (subsequent district court opinion dismissing First Amendment claim for failure to exhaust administrative remedies); see also *id.* at 2a-5a (vacating dismissal of First Amendment claim and remanding to district court).

[*i.e.*, 28 U.S.C. 2680(a)]." Pet. App. 21a (citing *Harris* v. *United States*, 422 F.3d 322, 336 (6th Cir. 2005)). The court noted that respondent's Eighth Amendment claim "arises out of the very same occurrence [as the prior FTCA suit]; the assault in 2008, and the same actions; the prison's alleged failure to protect." *Ibid.*

3. The court of appeals vacated the dismissal of respondent's Eighth Amendment *Bivens* claim. Pet. App. 1a-10a. The court first excused respondent's failure to exhaust administrative remedies based on his allegation—which the court assumed to be true—that prison officials had threatened him with retaliation if he pursued the prison grievance process. *Id.* at 3a-5a. That aspect of the court's ruling is not at issue here.

The court of appeals then held that the FTCA judgment bar does not foreclose respondent's Eighth Amendment claim. Pet. App. 6a-10a. The court observed that Section 2680(a) operates as a limitation on the district court's jurisdiction over FTCA cases, and that the district court's dismissal of respondent's FTCA claim under Section 2680(a) was therefore a dismissal for lack of subject-matter jurisdiction. *Id.* at 6a, 9a. The court held that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the [Section] 2676 judgment bar," reasoning that, "in the absence of jurisdiction, the court lacks the power to enter judgment." *Id.* at 6a. The court also invoked the "general rule" of *res judicata* that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." *Id.* at 9a.

4. The court of appeals subsequently denied petitioners' petition for rehearing en banc. Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

There is no dispute that respondent's prior FTCA case was terminated by the district court's entry of a "JUDGMENT" on behalf of the United States based on 28 U.S.C. 2680(a). Pet. App. 55a. That district court judgment unambiguously qualifies as a "judgment" for purposes of the FTCA's judgment bar, 28 U.S.C. 2676. It therefore also precludes respondent from bringing this separate *Bivens* claim based on the same underlying facts. The court of appeals erred in concluding otherwise, and its decision should be reversed.

I. The judgment bar states that "[t]he judgment in an action under section 1346(b)"—*i.e.*, in an FTCA action against the United States—"shall constitute a complete bar to any action" against the government employee based on the same subject matter. 28 U.S.C. 2676. That language plainly encompasses the judgment dismissing respondent's FTCA action under Section 2680(a).

At the time Congress enacted the FTCA in 1946, standard dictionaries defined "judgment" to include any final "determination [or] decision * * * of a court," *Webster's New International Dictionary* 1343 (2d ed. 1944) (*Webster's*); see, *e.g.*, *Bouvier's Law Dictionary* 606 (1934) (*Bouvier's*). That common understanding of the term was also reflected in Federal Rule of Civil Procedure 54(a) (1946), which defined "judgment" as including "any order from which an appeal lies." Congress ratified that understanding by expressly applying the federal rules to FTCA cases. FTCA, ch. 753, Tit. IV, § 411, 60 Stat. 844. Congress also used the term "judgment" elsewhere in the FTCA—most notably in the provision authorizing

appeals of "[f]inal judgments" in FTCA cases—in a way that plainly encompassed judgments of dismissal under Section 2680. § 412(a), 60 Stat. 844-845.

The purpose of the judgment bar confirms its application to Section 2680 dismissals. The judgment bar is intended to "save trouble for the Government and its employees" by "avoiding duplicative litigation, multiple suits on identical entitlements or obligations between the same parties." *Will* v. *Hallock*, 546 U.S. 345, 353-354 (2006) (citation and internal quotation marks omitted). Congress wanted to prevent unsuccessful FTCA plaintiffs from "turn[ing] around" and "su[ing]" the employee whose alleged misconduct was at issue, thereby initiating another disruptive round of litigation. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting *1942 Hearing* 9). That policy rationale applies—with full force—to FTCA cases dismissed under Section 2680. Just as in other FTCA cases, litigation over Section 2680 can require voluminous discovery, extensive motions practice, sometimes a full trial, and often an appeal. Congress did not want to allow multiple rounds of burdensome litigation over the same underlying claim.

Respondent and the court of appeals deny that the plain meaning of "judgment" applies in this context. Pet. App. 5a-8a; Br. in Opp. 33-35. In respondent's view (Br. in Opp. 33), the judgment bar applies only to a subset of judgments "capable of having some preclusive effect" under common-law principles of *res judicata*. That approach lacks any basis in the text—or context—of the judgment bar. As the Restatement (First) of Judgments and other leading authorities of the time make clear, the term "judgment" bore its ordinary meaning even in the *res judicata* context.

There was (and is) no specialized definition of "judgment" confining its scope to judgments "capable of having some preclusive effect" (*ibid.*).

In any event, a judgment of dismissal under Section 2680 qualifies as a "judgment" even under respondent's own theory. Section 2680 imposes "substantive limitations" on the FTCA liability of the United States, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955), and thus a judgment dismissing and FTCA claim under Section 2680 is "on the merits" for purposes of the doctrine of claim preclusion. Claim preclusion is also appropriate because Section 2680 reflects a determination by Congress that the United States is not liable to the plaintiff, such that the plaintiff's claim must fail in any federal court. See *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947). The fact that a Section 2680 judgment is technically for lack of jurisdiction makes no difference. See *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-81 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986). Furthermore, and at a minimum, a Section 2680 dismissal has preclusive effect under the related doctrine of issue preclusion.

Thus under either claim preclusion or issue preclusion, a Section 2680 dismissal forecloses the plaintiff's ability to bring a subsequent FTCA action against the United States. To the extent respondent is right (Br. in Opp. 33-34) that the judgment bar's purpose is to extend to federal employees the benefits of *res judicata*, the bar applies to judgments based on Section 2680.

II. Respondent has indicated that he will advance two new arguments in defense of the judgment below. Each of those arguments is inconsistent with the FTCA's text and this Court's precedent.

First, respondent asserts that the judgment bar's reference to an action "under" Section 1346(b) actually means an action "*properly* brought" under that provision. Br. in Opp. 34 (citations omitted). On that view, an FTCA action that is dismissed pursuant to Section 2680 was not "an action under section 1346(b)" in the first place. But that interpretation both rewrites the statute and directly conflicts with this Court's interpretation of other FTCA provisions in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), and *United States* v. *Smith*, 499 U.S. 160 (1991). As those decisions make clear, the judgment bar's reference to "an action under section 1346(b)" covers any action in which the plaintiff invokes Section 1346(b) as the basis for jurisdiction—which is to say, any FTCA action.

Second, respondent argues (Br. in Opp. 28-31) that Section 2680 itself prevents Section 2680 dismissals from triggering the judgment bar. That contention relies upon Section 2680's introductory language stating that "[t]he provisions of [Chapter 171 of Title 28 of the United States Code]"—including the judgment bar—"shall not apply to" any of the types of claims set forth in Section 2680. Respondent's argument is again foreclosed by *Smith*. There, the Court held that Section 2679(b)'s exclusive-remedy provision—which is also included in Chapter 171—applies to the claims identified in Section 2680. 499 U.S. at 161-162, 165-167. *Smith*'s holding is incompatible with respondent's argument that Section 2680 renders the enumer-

ated claims exempt from all of "[t]he provisions of this chapter."

ARGUMENT

The dismissal of plaintiff's FTCA claim under Section 2680 triggered the FTCA's judgment bar and forecloses plaintiff's subsequent *Bivens* action. The text of the judgment bar provides that "[t]he judgment in an action under section 1346(b) of [Title 28 of the United States Code] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. By its terms, the judgment bar contains three elements that must be satisfied in order to foreclose a suit against a federal employee: (1) there must be a prior "judgment"; (2) that "judgment" must have come in "an action under section 1346(b)"; and (3) that action must have involved "the same subject matter" as the present suit.

The parties appear to agree that the third requirement is satisfied here. As the district court recognized—and as respondent's own filings below make clear—his separate FTCA and *Bivens* suits turn on the same core allegation that petitioners tortiously failed to protect him from an assault by a fellow inmate. Pet. App. 21a; J.A. 42-43, 45-52, 93-99; see generally *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.) (holding that "same subject matter" test is satisfied so long as "the substance of the *Bivens* claims reveals that they arise from the same actions toward plaintiff by defendants as those that defined the FTCA case"), cert. denied, 479 U.S. 826 (1986).

This case therefore turns on whether the judgment bar's two other requirements are also satisfied. They

undoubtedly are. As explained further below, the district court's dismissal of respondent's FTCA case pursuant to Section 2680(a) constitutes a "judgment" under any reasonable construction of that term. 28 U.S.C. 2676. Respondent's FTCA case was also plainly "an action under section 1346(b)." *Ibid.* The court of appeals erred in denying application of the judgment bar in this case, and its decision should be reversed.

I. THE DISMISSAL OF RESPONDENT'S FTCA CASE PURSUANT TO SECTION 2680 CONSTITUTES A "JUDGMENT" FOR PURPOSES OF THE JUDGMENT BAR

Whether or not a judgment of dismissal under Section 2680 counts as a "judgment" for purposes of the judgment bar presents a question of statutory construction. This Court's general rule is that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (brackets, citation, and internal quotation marks omitted). In construing the FTCA, this Court has emphasized both that it is "bound to operate within the framework of the words chosen by Congress," *Richards* v. *United States*, 369 U.S. 1, 10 (1962), and that "the legislative purpose is expressed by the ordinary meaning of the words used," *Kosak* v. *United States*, 465 U.S. 848, 853 (1984) (citation omitted).

The district court's dismissal of plaintiff's FTCA claims unambiguously qualifies as a "judgment." On November 18, 2010, that court granted the United States' motion to dismiss respondent's FTCA claim pursuant to Section 2680(a)'s discretionary-function

exception. Pet. App. 47a-54a. That same day, the court issued a document entitled "JUDGMENT ENTRY" stating "IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Government's motion to dismiss is GRANTED. The complaint is hereby DISMISSED." *Id.* at 55a.

In every ordinary sense, those actions qualify as the entry of a "judgment" and fall within the plain terms of Section 2676's judgment bar. The district court's order resolved "all the claims and all the parties' rights and liabilities," see Fed. R. Civ. P. 54(b), and the "judgment" was "set out in a separate document," pursuant to Federal Rule of Civil Procedure 58(a). Thus, the judgment was an "order from which an appeal lies" and qualified as a "judgment," as that term is defined in Rule 54(a). Respondent has himself repeatedly acknowledged that the dismissal of his FTCA case constituted a "judgment."[5]

Respondent and the court of appeals deny that straightforward and commonsense conclusion. In their view, the judgment bar's unqualified reference to a "judgment" applies only to a subset of judgments that does not include dismissals of an FTCA claim under Section 2680. According to the court of appeals, "judgment" encompasses only non-jurisdictional judgments. Pet. App. 5a-8a. According to respondent (Br. in Opp. 33), "judgment" includes only those judgments "capable of having some preclusive effect" in subsequent litigation under principles of *res judicata*.

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[5] See, *e.g.*, J.A. 133 (respondent's "Motion to Alter or Amend Judgment"); J.A. 140 (noting same motion); J.A. 142 (respondent's "Motion to Recall Judgment," discussing district court's "Judgment of Dismissal of the Federal Tort Claim").

Both are mistaken. The judgment bar's text, structure, history, and purpose all make clear that the statutory term "judgment" extends to any judgment dismissing an FTCA case pursuant to Section 2680.

A. The Judgment Bar's Text Encompasses Section 2680 Dismissals

This Court has emphasized that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation and internal quotation marks omitted). Respondent's theory impermissibly rewrites the statutory language, adds a new requirement that any "judgment" have preclusive effect, and narrows the scope of the judgment bar.

1. The plain meaning of "judgment" at the time Congress enacted the FTCA encompassed Section 2680 dismissals

Respondent's view that the term "judgment" encompasses only judgments "capable of having some preclusive effect" (Br. in Opp. 33) is at odds with the way that term was understood when Congress enacted the FTCA in 1946. At that time, a "judgment" generally referred to any final adjudication of a case by a court, and it plainly encompassed the dismissal of an FTCA action under Section 2680.

a. In 1946, the ordinary dictionary meaning of the word "judgment"—when used in the context of legal proceedings—was "the determination, decision, decree, or sentence of a court." *Webster's* 1343; see 5 *Oxford English Dictionary* 618 (1933) (defining "judgment" as "[t]he sentence of a court of justice"

and "a judicial decision or order in court"). A judgment of dismissal under Section 2680(a) plainly qualifies as a "judgment" under that standard definition.

Prominent authorities on legal usage endorsed similar definitions of "judgment" that likewise embrace judgments of dismissal under Section 2680. For example, *Bouvier's Law Dictionary* defined "judgment" as either (1) "[t]he conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit," or (2) "[t]he decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury." *Bouvier's* 606.

Black's Law Dictionary contained multiple definitions of the term "judgment." Those included:

- "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination";
- "[t]he conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit";
- "[t]he final determination, by a court of competent jurisdiction, of the rights of the parties in an action or proceeding";
- "[t]he decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury";
- "[t]he sentence of the law pronounced by the court upon the matter appearing from the previous proceedings in the suit"; and

- "[t]he determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such a court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist."

Black's Law Dictionary 1024 (3d ed. 1933).

Each of those standard definitions encompasses the dismissal of an FTCA case under Section 2680, which reflects a district court's final conclusion that (1) the United States is not substantively liable to the claimant under the FTCA, and (2) the court lacks jurisdiction over the case. See pp. 4-5, *supra*; pp. 34-35, *infra*. Moreover, none of the standard definitions incorporates *res judicata* principles or otherwise turns on whether the judgment is "capable of having some preclusive effect." Br. in Opp. 33.

b. Courts applying the FTCA in the decade immediately following its passage confirmed that a Section 2680 dismissal constitutes a "judgment" under the ordinary meaning of that term. Numerous decisions from that period expressly refer to such dismissals as "judgment[s]."[6] The courts' natural—and entirely

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[6] See, *e.g.*, *Morton* v. *United States*, 228 F.2d 431, 432 (D.C. Cir. 1955) (affirming "judgment" of dismissal under Section 2680(a) and (h)), cert. denied, 350 U.S. 975 (1956); *Goodwill Indus. of El Paso* v. *United States*, 218 F.2d 270, 271 (5th Cir. 1954) (affirming "judgment" dismissing claim under Section 2680(a)); *Panella* v. *United States*, 216 F.2d 622, 623, 626 (2d Cir. 1954) (reversing "[j]udgment" dismissing claim under Section 2680(h)); *Stepp* v. *United States*, 207 F.2d 909, 911-912 (4th Cir. 1953) (affirming "judgment" in favor of United States under Section 2680(h)), cert. denied, 347 U.S. 933 (1954); *Broadway Open Air Theatre* v. *United States*, 208 F.2d 257, 258-260 (4th Cir. 1953) (per curiam) (affirming "judgment" in favor of United States under Section 2680(c));

appropriate—use of "judgment" to describe the dismissal of an FTCA case under Section 2680 is direct evidence of the "ordinary, contemporary, common meaning" of that term. *Octane Fitness*, 134 S. Ct. at 1756 (citation omitted). Excluding Section 2680 judgments from the scope of the judgment bar conflicts with that ordinary meaning.

2. Rule 54(a) and neighboring provisions of the FTCA confirm that a Section 2680 dismissal is a "judgment"

Congress's understanding that the judgment bar's reference to "judgment" encompasses Section 2680 dismissals is reinforced by both (1) the Federal Rules of Civil Procedure, and (2) neighboring provisions of the FTCA. At the time Congress enacted the FTCA, Rule 54(a) defined "[j]udgment" as "includ[ing] a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a) (1946); see Fed. R. Civ. P. 54(a) (2015) (same). No one—then or now—doubts that "an appeal lies" from a district court's dismissal of an FTCA case under Section 2680. That understanding makes sense only if such a dismissal counts as a "judgment" under Rule 54(a).

Rule 54(a)'s definition of "judgment" is especially significant because the original FTCA expressly incorporated the Federal Rules of Civil Procedure. Specifically, Section 411 of the FTCA explicitly stated

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In re Texas City Disaster Litig., 197 F.2d 771, 781 (5th Cir. 1952), aff'd, *sub nom. Dalehite* v. *United States*, 346 U.S. 15 (1953) (rendering "judgment" for United States under Section 2680(a)); *Johnson* v. *United States*, 170 F.2d 767 (9th Cir. 1948) (reversing "[j]udgment" dismissing claim under Section 2680(j)); *Wilcox* v. *United States*, 117 F. Supp. 119, 124 (S.D.N.Y. 1953) (granting "summary judgment" to United States under Section 2680(h)).

that those rules would govern the "forms of process, writs, pleadings, and motions, and the practice and procedure" in FTCA cases. § 411, 60 Stat. 844; see App., *infra*, 12a-13a. Section 412 then set forth the specific mechanisms for appeals in FTCA cases. See § 412, 60 Stat. 844-845; App., *infra*, 13a-14a. That provision indicated that "[f]inal *judgments* in the district courts in [FTCA actions] shall be subject to review by appeal" either (1) in the circuit courts of appeals, or (2) in the Court of Claims. § 412(a), 60 Stat. 844-845 (emphasis added).

Sections 411 and 412 support the conclusion that Congress understood Section 2680 dismissals to qualify as "judgment[s]" throughout the FTCA—including for purposes of the judgment bar. Congress obviously wanted to allow claimants to appeal such dismissals. Yet Congress authorized such appeals only for "[f]inal judgments in the district courts." § 412(a), 60 Stat. 844. In doing so, it plainly understood the term "judgments" to encompass the dismissal of an FTCA claim under Section 2680. There is no reason Congress would have used the same term ("judgment" and "judgments") in neighboring FTCA provisions (Section 410(b)'s judgment bar and Section 412(a)'s appellate review provision) if it had understood those terms to have entirely different meanings. See, *e.g.*, *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014) ("Generally, identical words used in different parts of the same statute are presumed to have the same meaning.") (ellipses, citation, and internal quotation marks omitted).

B. The Purpose Of The Judgment Bar Confirms That A Section 2680 Dismissal Is A "Judgment"

The core purpose of the judgment bar—avoiding duplicative litigation and thereby alleviating the strain on government resources and employee morale—confirms that the ordinary meaning of the term "judgment" in Section 2676 should be given effect.

1. Congress enacted the FTCA in part to address the problem that "the Government, through the Department of Justice, [wa]s constantly being called on by the heads of the various agencies to go in and defend" federal employees from suit. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (quoting *1942 Hearing* 9).[7] Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend

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[7] Much of the relevant history of the FTCA "appears in the Seventy-seventh Congress, rather than in the Seventy-ninth Congress, which enacted it." *Gilman*, 347 U.S. at 511 n.2 (citing *Dalehite*, 346 U.S. at 24-30). As this Court's opinion in *Gilman* notes, *ibid.*, Assistant Attorney General Shea's remarks at the 1942 hearing were made in specific reference to the provision that became Section 2672 of the FTCA, which provides that an FTCA plaintiff's acceptance of an "award, compromise, or settlement" offered by the Attorney General "shall constitute a complete release of any claim * * * against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." 28 U.S.C. 2672. The Court recognized, however, the similarities between Sections 2672 and 2676, *Gilman*, 347 U.S. at 511 n.2, as did Assistant Attorney General Shea in his own comments, see *1942 Hearing* 27 ("Judgment in a tort action constitutes a bar to further action upon the same claim, not only against the Government (as would have been true under H.R. 5373) but also against the delinquent employee, for reasons already discussed in respect of administrative adjustments of claims up to $1,000.").

large damage suits." *Ibid.* The FTCA addressed that problem by allowing plaintiffs to sue the United States instead of the individual employee. The judgment bar then prevents the plaintiff from "turn[ing] around and su[ing]" the individual employee once the FTCA action has gone to judgment. *Ibid.*

As the legislative history shows, Congress was aware of the significant costs associated with subjecting government employees to the risks of going to trial. Those costs include the potential for "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted) (discussing policy interests underlying immunities of government officials from suit); see also *1942 Hearing* 9. The judgment bar reflects Congress's "concern[] about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees." *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).

This Court recognized those core purposes of the judgment bar in *Will* v. *Hallock*, 546 U.S. 345 (2006). There, the Court held that a district court's decision not to apply the judgment bar is not immediately appealable under the collateral order doctrine. *Id.* at 348-349. In doing so, it distinguished the judgment bar from the doctrine of qualified immunity. *Id.* at 354. The Court explained that whereas the main purpose of qualified immunity is to properly incentivize government employees to show initiative in situations where the relevant law is not certain, the judgment bar's main goal is "to save trouble for the Government and its employees" by avoiding repetitive lawsuits

based on the same alleged misconduct. *Id.* at 353-354. In particular, the Court noted that the judgment bar's core purpose is to "avoid[] duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Id.* at 354-355 (quoting 18C *Federal Practice & Procedure* § 4402, at 9). The Court emphasized that the judgment bar operates to "respect[] a prior judgment by giving a defense against relitigation" based on the same underlying facts. *Id.* at 355.

2. Treating Section 2680 dismissals as "judgment[s]" for purposes of the judgment bar advances Congress's core objectives. A judgment in the government's favor on the basis of one of the Section 2680 exceptions frequently comes only "after extensive discovery and a trial." *Begay* v. *United States*, 768 F.2d 1059, 1060 (9th Cir. 1985) (affirming dismissal under Section 2680(a)'s discretionary-function exception). Litigation of those exceptions thus often consumes considerable time and energy on the part of the government and judiciary. To take one of the more extreme examples, this Court's decision in *Dalehite*, *supra*, held that the United States was not liable under Section 2680(a)—but only after the district court had already conducted a "trial on the merits" involving "hundreds of exhibits" and generating a transcript consisting of "nearly 20,000 pages." *In re Texas City Disaster Litig.*, 197 F.2d 771, 773 (5th Cir. 1952) (citation omitted); see *Dalehite*, 346 U.S. at 24-25. Other examples of burdensome and intrusive Section 2680 litigation abound.[8]

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[8] See, *e.g.*, *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandese*, 467 U.S. 797, 803-804, 821 (1984) (holding that United States was entitled to judgment under Section 2680 after full trial);

In re Katrina Canal Breaches Consol. Litig., 696 F.3d 436, 449-452 (5th Cir. 2012) (concluding, based on evidence presented in four-week bench trial, that Section 2680(a) bars claims), cert. denied, 133 S. Ct. 2855 (2013); *Kelly* v. *United States*, 241 F.3d 755, 757, 764 (9th Cir. 2001) (holding that United States was entitled to judgment of dismissal under Section 2680(a), after full trial); *Irving* v. *United States*, 162 F.3d 154, 158-159, 169 (1st Cir.) (en banc) (holding that United States was entitled to judgment under Section 2680(a), after nearly 20 years of litigation and three separate appeals), cert. denied, 528 U.S. 812 (1999); *Aragon* v. *United States*, 146 F.3d 819, 821 (10th Cir. 1998) ("After a four-day bench trial focusing on the discretionary function exception, the district court dismissed the case for lack of subject matter jurisdiction."); *Andrews* v. *United States*, 121 F.3d 1430, 1435 (11th Cir. 1997) (holding that United States was entitled to judgment of dismissal under Section 2680(a), after full trial); *Blackburn* v. *United States*, 100 F.3d 1426, 1435-1436 (9th Cir. 1996) (rejecting plaintiff's argument that "120 days of discovery" in which United States "produced thousands of pages of documents" was insufficient for purposes of litigating applicability of Section 2680(a)); *Allen* v. *United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (holding that Section 2680(a) applies and reversing district court's judgment against United States after extensive trial involving 98 witnesses, 1692 documentary exhibits, and 273-page district court opinion, see 588 F. Supp. 247 (D. Utah 1984)), cert. denied, 484 U.S. 1004 (1988); *Barnson* v. *United States*, 816 F.2d 549, 551 (10th Cir.) (noting "extensive discovery" before district court granted summary judgment to United States under Section 2680(a)), cert. denied, 484 U.S. 896 (1987); *Coffey* v. *United States*, 906 F. Supp. 2d 1114 (D.N.M. 2012) (adjudicating applicability of Section 2680(a) following two-day bench trial); *Villanueva* v. *United States*, 708 F. Supp. 2d 960 (D. Ariz. 2009) (entering judgment for United States based on Section 2680(a) after eight years of litigation involving multiple appeals to the Ninth Circuit and an appeal to this Court); *Limone* v. *United States*, 497 F. Supp. 2d 143, 202-204 (D. Mass. 2007) (rejecting applicability of Section 2680(a) and (h) based on trial evidence); *Loughlin* v. *United States*, 286 F. Supp. 2d 1, 9 (D.D.C. 2003) (noting "six months" of "extensive discovery" regarding applicability of Section 2680(a)); *Stewart* v.

The factual inquiry that courts have sometimes found necessary to determine the application of one of the exceptions in Section 2680 flows from the substantive character of that provision. For example, Section 2680(a)'s discretionary-function exception provides that the United States cannot be held liable under the FTCA on a claim arising out of the performance of "a discretionary function or duty" on the part of a federal employee or agency. Applying that exception requires courts to conduct an inquiry similar to the one used to determine whether a federal employee is entitled to common-law immunity from a state-law tort claim—a non-jurisdictional defense. In *Westfall* v. *Erwin*, 484 U.S. 292 (1988), the Court held that federal officials have immunity from state-law tort liability only if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Id.* at 300. As the Court recognized, that inquiry is "complex and often highly empirical." *Ibid.* The same is true in the context of the FTCA, where disputes over Section 2680(a) can often lead to a "quagmire of litigation." *Irving* v. *United States*, 532 F. Supp. 840, 844-845 (D.N.H. 1982) (citation and internal quotation marks omitted), vacated by 867 F.2d 606 (1988) (Tbl.); see generally note 8, *supra*.

In short, allowing FTCA plaintiffs to "turn around and sue" the individual employee once the plaintiff's FTCA claim has gone to judgment would impose "a very substantial burden" on the government to defend against the suit a second time. *1942 Hearing* 9. That

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United States, 486 F. Supp. 178, 182, 185 (C.D. Ill. 1980) (dismissing case under Section 2680(a) after "extensive discovery" and "numerous discovery disputes").

is the very burden that the judgment bar was intended to eliminate.

C. *Res Judicata* Principles Do Not Prevent Section 2680 Dismissals From Triggering The Judgment Bar

The court of appeals refused to apply the judgment bar here on the grounds that the bar is triggered only by a "judgment on the merits" under the common-law doctrine of *res judicata*. Pet. App. 6a, 9a. Respondent has advanced essentially the same argument in this Court. He asserts that (1) the judgment bar "must be understood, against the backdrop of *res judicata*, as referring to judgments capable of having some preclusive effect in the first place"; (2) the purpose of the judgment bar is to promote "symmetry" and "*expand* that preclusive effect to *non-parties*—not to grant such effect to judgments that *never* would have had preclusive force *even against the original litigants*," and (3) jurisdictional dismissals—including dismissals under Section 2680—"*never*" have preclusive force and thus do not count as "judgment[s]" for purposes of the judgment bar. Br. in Opp. 33-34; see also *id.* at 35 ("[D]ismissal for lack of subject-matter jurisdiction is not a 'judgment' entitled to preclusive effect.").

Those arguments lack merit. Although the judgment bar and *res judicata* serve similar purposes, see pp. 23-25, *supra*, the judgment bar does not expressly incorporate *res judicata* principles, and the term "judgment" has the same meaning in the *res judicata* context that it does in other legal settings.[9] In any

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[9] In *Will*, this Court recognized an analogy between the judgment bar and *res judicata* when considering the question (not at issue here) of whether to apply the collateral order doctrine to a

event, even if respondent were right that Congress used the term "judgment" to encompass judgments "capable of having some preclusive effect" (Br. in Opp. 33), a Section 2680 dismissal is entitled to such effect under the *res judicata* doctrines of claim preclusion and issue preclusion. As a result, such dismissals count as "judgment[s]"—and trigger the judgment bar—even under respondent's theory.

1. The ordinary meaning of the term "judgment" governs the use of that term in the context of res judicata

When Congress used the unadorned term "judgment" in the judgment bar, it did not intend to refer only to judgments "on the merits" (Pet. App. 6a) or "capable of having some preclusive effect" (Br. in Opp. 33). As explained above, the term "judgment" had a settled meaning—in ordinary speech and in common legal parlance—that encompassed all final adjudications of a case. See pp. 18-22, *supra*. Congress would not have referred to "the judgment" in an FTCA action if it had intended to refer only to a subset of judgments.

Respondent emphasizes this Court's longstanding view that "'the words of a statute must be read in their context,'" and he asserts that "[t]he context of [the judgment bar] is preclusion and *res judicata*." Br. in Opp. 32 (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). But it does not follow that Congress's reference to "judgment" neces-

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district court's decision not to apply the judgment bar. 546 U.S. at 354. In doing so, however, the Court noted that "the statutory judgment bar is arguably broader than traditional res judicata." *Ibid.*

sarily encompasses only judgments "capable of having some preclusive effect." *Id.* at 33. That term has never been understood—not even in the *res judicata* context—to refer only to judgments that are on the merits or that otherwise trigger preclusion.

At the time Congress enacted the FTCA, leading common-law authorities interpreted the term "judgment" to encompass the final decision in a case, whether or not that decision actually adjudicated the substance of the underlying cause of action. For example, the Restatement (First) of Judgments—which was completed in 1942, four years before Congress enacted the FTCA—expressly recognized that when a court rules for a defendant "based on the lack of jurisdiction of the court over the defendant or over the subject of the action," that decision nonetheless still constitutes a "judgment." *Id.* § 49 cmt. a, at 194. Moreover, at that time, this Court had repeatedly used the term "judgment" to describe the dismissal of a case for lack of jurisdiction.[10]

The leading scholarly treatise on judgments likewise made clear that the term "judgment" was understood to cover judicial decisions that did not resolve the merits of the underlying substantive claim at issue. See 1 Henry Campbell Black, *A Treatise on the*

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[10] See, *e.g.*, *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 699-700 (1927) (noting holding of *Shaffer* v. *Carter*, 252 U.S. 37, 44 (1920), that "a judgment of dismissal for lack of jurisdiction is a final judgment for purposes of appeal"); see *Great W. Ins. Co.* v. *United States*, 112 U.S. 193, 196 (1884) (explaining that when a court "is forbidden to entertain jurisdiction," then a "judgment of dismissal" is appropriate); cf. *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 291 (1947) (referring to this Court's "judgment declining jurisdiction" over appeal) (citation omitted).

Law of Judgments § 21, at 28 (1891). As that treatise explained, "[a] *judgment* of nonsuit or dismissal is final, though it does not reach the merits." *Ibid.* (emphasis added); see *id.* § 13, at 18 (stating that a judgment for the defendant on a legal issue raised by a demurrer "is a final judgment"); *id.* § 27, at 32 (stating that the "dismissal of * * * a suit at law * * * is a final judgment").

Nor is respondent right to suggest (Br. in Opp. 33) that Congress would have used the term "judgment"—without a modifier—to encompass only those final judgments "capable of having some preclusive effect." That is not how the Restatement (First) of Judgments used the term in its extended discussion of *res judicata*. The Restatement explained that some "judgment[s]" (*i.e.*, those "on the merits") have claim-preclusive effect,[11] whereas other "judgment[s]" (*i.e.*,

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[11] See, *e.g.*, Restatement (First) Judgments § 48, at 191 (stating general rule that "[w]here a valid and final personal judgment is rendered *on the merits* in favor of the defendant," plaintiff is barred from bringing subsequent suit based on same cause of action) (emphasis added); *id.* § 50, at 197 (where "judgment" is rendered for defendant because complaint is insufficient as matter of law, "*if the judgment is on the merits*" the plaintiff cannot bring subsequent suit based on same cause of action) (emphasis added); *id.* § 96(1)(a), at 472 (stating rule that "a valid judgment * * * for the defendant[-indemnitor] *on the merits* for reasons not personal to the defendant" terminates a cause of action against the indemnitee) (emphasis added); *id.* § 99, at 493 (noting that "[a] valid judgment *on the merits* and not based on a personal defense" in favor of the defendant "bars a subsequent action by the plaintiff against another responsible for the conduct of such person if the action is based solely upon the existence of a tort or breach of contract by such person") (emphasis added).

those "not on the merits") do not.[12] But—contrary to respondent's theory—the Restatement never suggested that the latter type of judgment somehow did not qualify as a "judgment." There is accordingly no textual or historical reason to believe that Congress used the broad term "judgment" to refer only to the subset of judgments with preclusive force.

2. A judgment of dismissal under Section 2680 has preclusive effect under the related doctrines of claim preclusion and issue preclusion

Even if respondent were right that the judgment bar applies only to judgments "capable of having some preclusive effect" (Br. in Opp. 33), it would still apply to judgments of dismissal under Section 2680. As this Court has explained, "[t]he preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008). Both branches of *res judicata* serve the important goals of "reliev[ing] parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). Both protect the United States from being sued on an FTCA claim that has already been subject to a judgment of dismissal

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[12] See, *e.g.*, Restatement (First) Judgments § 49, at 193 (noting that plaintiff is generally not precluded from bringing subsequent suit based on same cause of action where his prior suit resulted in a "valid and final personal judgment *not on the merits*") (emphasis added); *id.* § 49 cmt. a, at 194 (identifying a "judgment * * * based on the lack of [subject-matter] jurisdiction" as one that is "*not on the merits*") (emphasis added); see also *id.* § 51 cmt. b, at 202; *id.* § 52 cmt. g, at 205; *id.* § 59 & cmt. b, at 236-238.

under Section 2680. Because such judgments are thus "capable of having some preclusive effect" (Br. in Opp. 33), they qualify as "judgment[s]" even under respondent's interpretation of the judgment bar.

a. Under the doctrine of claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). For purposes of claim preclusion, a judgment "on the merits" is "one that actually 'pass[es] directly on the substance of [a particular] claim' before the court." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 501-502 (2001) (brackets in original) (quoting 1 Restatement (Second) of Judgments § 19 cmt. a, at 161 (1982)).[13] Moreover, a judgment is "on the merits" for claim-preclusion purposes if—even though the judgment "declin[es] to reach [the] ultimate substantive issues"—it is "based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation." *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947).

A judgment dismissing an FTCA case pursuant to Section 2680 triggers the doctrine of claim preclusion for two independent reasons. First, such a judgment

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[13] See Restatement (First) Judgments § 49 cmt. a, at 193 (noting that a judgment is "on the merits" when it is based "on rules of substantive law" and "determines that the plaintiff has no cause of action."); Jack H. Friedenthal et al., *Civil Procedure* § 14.7, at 652 (2d ed. 1993) ("In general terms, a judgment is considered to be on the merits if it is a disposition based on the validity of the plaintiff's claim rather than on a technical procedural ground.").

"passes directly on the substance" of the plaintiff's FTCA claim against the United States. *Semtek Int'l*, 531 U.S. at 501-502 (brackets and citation omitted). As explained above, Section 2674 establishes the substantive "Liability" of the United States for torts committed by government employees. See p. 4, *supra*. Section 2680 creates exceptions to that liability. See 28 U.S.C. 2680 (stating that "[t]he provisions of [Chapter 171]"—including Section 2674—"shall not apply to" the enumerated exceptions). A Section 2680 dismissal thus necessarily reflects the court's final and conclusive determination that the United States is not substantively liable to the plaintiff under the FTCA.

This Court has repeatedly emphasized that Section 2680 imposes "substantive limitations" on the United States' FTCA liability. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955). In *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013), for example, the Court stated that, "[s]ubstantively, [Section 2674 of] the FTCA makes the United States liable" to the same extent as private individuals under state law, "subject to enumerated exceptions to the immunity waiver, §§ 2680(a)-(n)." Similarly, this Court described Section 2680 as setting forth "various statutory exceptions to FTCA liability" in *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992). See also, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315 (1991); *Rayonier* v. *United States*, 352 U.S. 315, 318 (1957). As the Court explained in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandese*, 467 U.S. 797 (1984), Section 2680 marks "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id.* at 808.

Treating the Section 2680 exceptions as substantive also tracks the understanding of the FTCA's principal draftsman. As Department of Justice official Alexander Holtzoff explained, the claims identified in what eventually became Section 2680 constitute "exceptions to liability" designed "to protect the taxpayers." *Report on Proposed Federal Tort Claims Bill* 15-16 (1931) (*Holtzoff Report*).[14] It also makes sense in light of the extensive litigation that is often required to establish the applicability of a Section 2680 defense, as well as the similarity of certain Section 2680 exceptions to substantive common-law defenses to liability. See pp. 25-28, *supra*. Notably, respondent does not appear to dispute that a judgment of dismissal under Section 2680 reflects a substantive determination that the plaintiff's claim is invalid. See Br. in Opp. 36-37.

Second, apart from its inherently substantive character, a judgment of dismissal under Section 2680 also has claim-preclusive effect because it is "based * * * on * * * the inaccessibility of all the courts of the [United States] to [FTCA] litigation." *Angel*, 330 U.S. at 190. Such a judgment reflects Congress's determination that the United States is not liable to the plaintiff; plaintiff's FTCA claim would thus fail in any federal court within the United States. See, *e.g.*, *Frigard* v. *United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam) (noting that Section 2680(a) dismissal means

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[14] See *Holtzoff Report* 15-20 ("In order to protect the taxpayers in this connection, * * * it is proposed to safeguard the United States by enumerating certain exceptions to liability. * * * The following is a list of the proposed exceptions to liability: [continues to list and describe exceptions, most of which were ultimately incorporated in Section 2680]."); *Kosak*, 465 U.S. at 857 n.13 (relying on *Holtzoff Report*).

that "no other court has the power to hear the case, nor can the [plaintiffs] redraft their claims to avoid the exceptions to the FTCA"), cert. denied, 490 U.S. 1098 (1989). The judgment therefore triggers claim preclusion even though it does not directly address whether the federal employee actually committed the alleged tort. See *Angel*, 330 U.S. at 190 ("It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation.").

b. Respondent and the court of appeals deny that a Section 2680 dismissal can trigger claim preclusion. In particular, they cite the general rule that a dismissal for lack of subject-matter jurisdiction is not substantive, and thus not entitled to claim-preclusive effect. Pet. App. 6a-10a; Br. in Opp. 33-35; see 1 Restatement (Second) of Judgments § 20, at 170. But that rule reflects the ordinary circumstance in which a court's dismissal for lack of jurisdiction is entirely distinct from its consideration of the merits. As Justice Breyer has made clear, that rule does not apply in the rare situation in which the jurisdictional inquiry and the merits inquiry turn on the exact same legal issue, such that the court's determination of that issue simultaneously and necessarily resolves both. See *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-81 (1st Cir. 1985), cert. denied, 476 U.S. 1159 (1986); see 18A *Federal Practice & Procedure* § 4441 n.30, at 234 (endorsing Justice Breyer's analysis). That is the case here, where the court's determination that a claim falls into one of the Section 2680 exceptions means that both (1) the court lacks jurisdiction, and (2) the United States is not substantively liable for the alleged tort.

Granting such dual-purpose determinations claim-preclusive effect is consistent with *res judicata*'s broad goal of avoiding duplicative litigation, conserving judicial resources, and encouraging reliance on prior decisions. *Allen*, 449 U.S. at 94; see pp. 23-25, *supra*. It also reflects the basic rule that claim preclusion applies when a court necessarily "determines that the plaintiff has no cause of action." Restatement (First) Judgments § 49 cmt. a, at 193. By contrast, the exception to claim preclusion for judgments based on lack of jurisdiction is premised on the assumption that jurisdictional dismissals usually involve "technical" or "procedural" defects that may be "cured" in a subsequent action. *Rose*, 778 F.2d at 79 (Breyer, J.).[15] Such a defect is *not* curable, however, when it also defeats the plaintiff's substantive claim on the merits. In such circumstances, the policy interest underlying the jurisdictional exception to claim preclusion does not apply, and there is no reason to permit the plaintiff to bring the same claim a second time.

Courts have often recognized the claim-preclusive effect of a judgment that—although technically based on lack of jurisdiction—nonetheless necessarily embodies a conclusion that the plaintiff lacks a valid cause of action on the merits. Some have done so in the exact context at issue here, concluding that a Sec-

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[15] See *Rose*, 778 F.2d at 79-80 (explaining that "jurisdictional" exception applies to cases dismissed based on "defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again"); see generally, *e.g.*, *Civil Procedure* § 14.7, at 652 ("In general terms, a judgment is considered to be on the merits if it is a disposition based on the validity of the plaintiff's claim rather than on a technical procedural ground.").

tion 2680 dismissal reflects a substantive conclusion that the plaintiff cannot prevail on his FTCA claim.[16] Courts also regularly designate Section 2680 dismissals as being "with prejudice"—a label reflecting their conclusive and preclusive nature.[17]

Other courts have similarly concluded that the dismissal of a claim based on state sovereign immunity—a defense that establishes the court's lack of jurisdiction—also triggers claim preclusion.[18] And in *Rose*, the First Circuit held that the dismissal of a

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[16] See, *e.g.*, *Jones* v. *United States*, 228 F.2d 52, 53 (D.C. Cir. 1955) (per curiam); *Bloomquist* v. *Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995); *Wohlford* v. *United States*, 823 F. Supp. 386, 389 (W.D. Va. 1992).

[17] See, *e.g.*, *Steele* v. *Federal Bureau of Prisons*, 355 F.3d 1204, 1213-1214 (10th Cir. 2003) (affirming dismissal with prejudice under Section 2680), cert. denied, 543 U.S. 925 (2004); *Anderson* v. *United States*, 317 F.3d 1235, 1236, 1240 (11th Cir.) (per curiam) (same), cert. denied, 540 U.S. 965 (2003); *Singleton* v. *United States*, 277 F.3d 864, 869 (6th Cir. 2002) (same), overruled on other grounds by *Hawver* v. *United States*, No. 14-1501, 2015 WL 9245249 (6th Cir. Dec. 17, 2015); *Saunders* v. *Bush*, 15 F.3d 64, 66 (5th Cir.) (same), cert. denied, 512 U.S. 1207 (1994); *Frigard*, 862 F.2d at 204 (same); *Midwest Knitting Mills, Inc.* v. *United States*, 741 F. Supp. 1345, 1352 (E.D. Wis. 1990) (dismissing with prejudice), aff'd, 950 F.2d 1295 (7th Cir. 1991); but see, *e.g.*, *Hart* v. *United States*, 630 F.3d 1085, 1091 (8th Cir. 2011) (modifying dismissal to be without prejudice).

[18] See, *e.g.*, *Flores* v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984) ("A summary judgment on grounds of sovereign immunity is," under Texas law, "a judgment on the merits for purposes of res judicata."); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984) ("In Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion."); *Herring* v. *Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 656 S.E.2d 307, 311 (N.C. Ct. App. 2008).

case based on the expiration of a jurisdictional statute of limitations nonetheless had claim-preclusive effect because the statutory time limit extinguished the plaintiff's "underlying substantive 'right.'" 778 F.2d at 79-81 (Breyer, J.). These various lines of decision are generally consistent with this Court's recognition that "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [i]s bound to apply," "the limitation is essentially substantive." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 695 n.15 (2004).

c. Apart from claim preclusion, a Section 2680 judgment of dismissal is also "capable of having some preclusive effect" (Br. in Opp. 33) under the issue-preclusion branch of *res judicata*. The general rule of issue preclusion is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302-1303 (2015) (brackets in original) (quoting 1 Restatement (Second) of Judgments § 27, at 250). "It has long been the rule" that issue preclusion "appl[ies] to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).[19]

Under issue preclusion, a judgment of dismissal under Section 2680—regardless of whether it is con-

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[19] See 1 Restatement (Second) of Judgments § 12 cmt. c, at 119; *id.* § 20 cmt. b, at 171; Restatement (First) of Judgments § 49 cmt. b, at 195; 18 *Federal Practice & Procedure* § 4418, at 467-469.

sidered jurisdictional, substantive, or both—has preclusive effect in any subsequent FTCA litigation between the plaintiff and the United States. If a plaintiff whose initial FTCA action was dismissed under Section 2680 files a subsequent FTCA action based on that same claim, it can be dismissed based on the preclusive effect of the first judgment. The court's determination that a particular claim falls within Section 2680 is conclusive and final, and it forecloses the plaintiff from relitigating the applicability of Section 2680. In this context, there is no meaningful distinction between issue preclusion and claim preclusion: Both doctrines bar the plaintiff from litigating his or her FTCA case a second time. Respondent is thus wrong to assert (Br. in Opp. 33-34) that an FTCA "dismissal for lack of jurisdiction would not even preclude the plaintiff from suing the [United States] on a claim arising from the same events" and that such a judgment "*never* would have * * * preclusive force *even against the original litigants*."

d. Respondent's overarching theory is that the core purpose of the judgment bar is to "ensure symmetry in *res judicata* treatment of tort claims against the Government and its employees" by "expand[ing] th[e] preclusive effect" of an FTCA judgment—which would otherwise only protect the United States—to the employee accused of committing the tort. Br. in Opp. 33 (emphasis omitted). But as discussed above, both claim preclusion and issue preclusion insulate the United States from any attempt by the plaintiff to relitigate an FTCA claim that has previously been dismissed under Section 2680. If respondent is correct that the judgment bar extends that same "preclusive effect" (*ibid.*) to the employee, then the "sym-

metry" that respondent invokes requires that the employee must likewise be completely insulated from suit.

Thus even if *res judicata* principles are relevant to the judgment bar, they only confirm its applicability to Section 2680 dismissals such as the one at issue in this case. Whether viewed in light of *res judicata* or otherwise, any such dismissal qualifies as a "judgment" and bars a subsequent claim against the employee.

D. Respondent's *Bivens* Claim Would Be Dismissed Even Under The Ninth Circuit's Narrower Construction of the Judgment Bar

Echoing some of respondent's policy concerns about the potential breadth of the judgment bar (see Br. in Opp. 39), the Ninth Circuit has adopted a narrower reading that would extend the judgment bar to some, but not all, FTCA judgments.[20] That approach does not help respondent here, however, because even the Ninth Circuit correctly treats Section 2680 dismissals as "judgment[s]" that trigger the judgment bar.

The key Ninth Circuit decision is *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008). There, the Ninth Circuit distinguished between a dismissal based on a substantive provision that limits the FTCA liability of the United States in all courts and a dismissal based on a procedural or technical defect that would permit the FTCA action to be refiled. The Ninth Circuit held

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[20] See *Pesnell* v. *Arsenault*, 543 F.3d 1038, 1042 (9th Cir. 2008); *id.* at 1046 (Clifton, J., concurring); see also *Hallock* v. *Bonner*, 387 F.3d 147, 156 (2d Cir. 2004) (Marrero, J., concurring) (advocating approach similar to Ninth Circuit), vacated by *sub nom. Will* v. *Hallock*, 546 U.S. 345 (2006).

that the judgment bar covers FTCA judgments that reflect a decision by Congress to "explicitly carve[] out an exception to its waiver of sovereign immunity," and thus to "flatly reject[] liability" for a category of claims. *Id.* at 1046 (Clifton, J., concurring); see *id.* at 1042 (opinion for court endorsing Judge Clifton's analysis). The court in *Pesnell* held that a judgment based on one of the Section 2680 exceptions falls squarely within that category. *Id.* at 1046.

The Ninth Circuit distinguished such substantive FTCA judgments from those based on curable procedural defects, which would include non-substantive dismissals for improper venue, failure to exhaust administrative remedies, and the like. *Pesnell*, 543 F.3d at 1046 (Clifton, J., concurring). The court explained that such procedural dismissals reflect Congress's decision to "accept[] possible liability," but to "channel[] the claims in a specific way." *Ibid.* A dismissal on those grounds, the court suggested, would not trigger the judgment bar. *Ibid.*

Like respondent's theory, the Ninth Circuit's effort to distinguish between different types of judgments has no basis in the text of the judgment bar. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). That said, the Ninth Circuit's approach has advantages that respondent's broader appeal to *res judicata* principles lacks. For one thing, that approach establishes a clear rule that is easy to apply and does not turn on the complexities of the *res judicata* doctrine. For another, it is largely faithful to the judgment bar's core goal of avoiding duplicative litigation. See *Pesnell*, 543

F.3d at 1046 (Clifton, J., concurring). When a plaintiff's FTCA claim is dismissed based on Congress's substantive decision to "flatly reject[] liability" for a category of claims, *ibid.*, that plaintiff cannot bring the same suit against the United States a second time. In those circumstances, the judgment bar serves the goal of avoiding repeat litigation by foreclosing any suit based on the same underlying facts against the individual federal employee. By contrast, a procedural dismissal based on a curable procedural defect essentially puts the plaintiff back in the position that he or she was in before filing suit in the first place. Because the plaintiff is free to re-assert his FTCA claim against the United States, such dismissals may not overly intrude on Congress's desire to prohibit duplicative litigation.

This case does not require the Court to assess the Ninth Circuit's approach or consider whether the judgment bar is triggered by dismissals on purely technical or procedural grounds. Respondent's FTCA action was dismissed based on Section 2680, which—as the Ninth Circuit held—is not a curable defect. Even under the alternative approach set forth in *Pesnell*, therefore, the judgment bar applies, and respondent's *Bivens* claim may not proceed.

II. RESPONDENT'S NEW ARGUMENTS AGAINST APPLYING THE JUDGMENT BAR LACK MERIT

In opposing certiorari, respondent advanced two new arguments that he failed to raise below and that the court of appeals never addressed. Specifically, respondent argued that (1) when an FTCA case is dismissed under Section 2680, it does not qualify as "an action under section 1346(b)" for purposes of the judgment bar, 28 U.S.C. 2676; and (2) in any event,

Section 2680 itself contains language establishing that the judgment bar does not apply to claims falling within its exceptions. See Br. in Opp. 24-25, 28-31, 34. Those arguments are at odds with the text of the FTCA and this Court's settled precedent.[21]

A. Respondent's FTCA Action Was "An Action Under Section 1346(b)"

By its terms, the judgment bar applies to any judgment in "an action under section 1346(b)." 28 U.S.C. 2676. Respondent does not—and cannot—dispute that he filed his prior suit "under" Section 1346(b), which is the sole basis for a district court's jurisdiction over an FTCA action. Respondent made clear throughout that case that his tort claim was "filed under the [FTCA]." J.A. 123 (response to motion to dismiss); see J.A. 91 (complaint, styled as an appeal of the denial of respondent's administrative tort claim under the FTCA). The district court noted that respondent sought relief "under the * * * FTCA" and stated that "[t]here is no dispute that [respondent's] claim falls under the FTCA." Pet. App. 48a. And the court of appeals likewise acknowledged that respondent filed his action "pursuant to the [FTCA]" and "under the FTCA." *Id.* at 62a-63a.

Respondent now argues that when an FTCA action is dismissed for lack of jurisdiction under Section 2680, that action does not qualify as "an action under section 1346(b)" for purposes of the judgment bar.

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[21] Although a respondent is entitled to raise new arguments in defense of the judgment, this Court "ordinarily do[es] not review claims made for the first time in this Court." *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (exercising discretion and declining to address new argument).

Br. in Opp. 34. In respondent's view, a district court's determination that it lacks jurisdiction to adjudicate an FTCA case means that the case was not brought "under" the FTCA in the first place. *Ibid.* That interpretation is at odds with the judgment bar's text and this Court's interpretation of nearly-identical language in 28 U.S.C. 2679.

1. As enacted by Congress, the judgment bar applies to the judgment in any "action under section 1346(b)." 28 U.S.C. 2676. That phrase encompasses any action invoking Section 1346(b) as the basis of a court's jurisdiction. As respondent appears to acknowledge, his theory requires revising the judgment bar to make it apply to any action "*properly* brought *under*" the FTCA. Br. in Opp. 34 (citation omitted). But there is no justification for departing from the words Congress chose. As this Court has emphasized, courts "are not at liberty to rewrite [a] statute to reflect a meaning [they] deem more desirable"; rather, they "must give effect to the text Congress enacted." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008).

2. Respondent's interpretation of the phrase "action under section 1346(b)" also contradicts this Court's interpretation of virtually identical language in 28 U.S.C. 2679(a). In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), this Court held that Section 2679(a)'s phrase "cognizable under section 1346(b)" encompasses all tort claims that satisfy the express terms of Section 1346(b), regardless of whether other FTCA provisions foreclose relief. *Id.* at 477 & n.5. The Court's analysis in that case forecloses respondent's interpretation of the judgment bar here.

Section 2679(a) is one of the FTCA's exclusive-remedy provisions. It makes the FTCA the exclusive avenue for tort claims against the government, even against agencies that may otherwise "sue and be sued" in their own names. See *Meyer*, 510 U.S. at 476. Specifically, Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)* of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a) (emphasis added).

In *Meyer*, this Court stated that a claim is "cognizable under section 1346(b)" if it is within the category of claims defined by Section 1346(b), which includes

> claims that are * * * "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

510 U.S. at 477 (brackets in original) (quoting 28 U.S.C. 1346(b)(1)). The Court explained that a claim "comes within this jurisdictional grant—and thus is 'cognizable' under [Section] 1346(b)—if it is actionable under [Section] 1346(b). And a claim is actionable under [Section] 1346(b) if it alleges the six elements

outlined above." *Ibid.* Indeed, the Court emphasized that "[t]he question is not whether a claim is cognizable *under the FTCA* generally * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. *Id.* at 477 n.5 (quoting 28 U.S.C. 2679(a)).

Applying *Meyer*, several courts of appeals have recognized that a claim is "cognizable under section 1346(b)" for purposes of Section 2679(a)—and thus precludes suit against the agency directly—so long as it asserts a tort claim against the United States premised upon state law, even if that claim is ultimately barred by one of the exceptions set forth in Section 2680.[22]

Respondent makes no effort to reconcile his construction of the judgment bar's phrase "action under section 1346" with *Meyer*'s construction of Section 2679(a)'s phrase "cognizable under section 1346(b)." Nor is there any apparent justification for treating the two phrases so differently. To the contrary, *Meyer* specifically equated the phrase "cognizable under section 1346(b)" with the phrase "actionable under [Section] 1346(b)," 510 U.S. at 477, which is virtually indistinguishable from the judgment bar's phrase "action under section 1346(b)." 28 U.S.C. 2676. But if *Meyer* is right that a claim that "alleges the six elements outlined above" is "actionable under [Section] 1346(b)," 510 U.S. at 477, then a complaint that alleges those six elements and rests on Section 1346(b) as the

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[22] See *Burrows* v. *United States*, 120 Fed. Appx. 448, 449-450 (4th Cir. 2005) (per curiam); *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Me. Corp.* v. *United States Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999).

basis for jurisdiction—as respondent's FTCA complaint did—is an "action under section 1346(b)," 28 U.S.C. 2676.

3. Respondent's interpretation of the judgment bar also runs afoul of this Court's interpretation of the FTCA's other exclusive-remedy provision, 28 U.S.C. 2679(b). Adopted as part of the Westfall Act, Section 2679(b) states that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title" is exclusive and bars a claim against the employee whose conduct is at issue. 28 U.S.C. 2679(b)(1); see 28 U.S.C. 2679(b)(2) (recognizing exception to this rule for *Bivens* and certain statutory actions). In *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected a construction of Section 2679(b)'s phrase "remedy * * * provided by sections 1346(b) and 2672" that is nearly identical to the reading of the judgment bar's phrase "under section 1346(b)" that respondent urges here. *Id.* at 165-175.

In *Smith*, the Ninth Circuit had held that Section 2679(b)'s exclusive-remedy provision could foreclose a suit against the federal employee in his individual capacity only if the FTCA would in fact provide the plaintiff a remedy once the United States was substituted as the defendant. See *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (9th Cir. 1989); 28 U.S.C. 2679(d) (establishing substitution mechanism). Because the FTCA's foreign country exception, 28 U.S.C. 2680(k), would have precluded recovery against the United States in an action under Section 1346(b), the Ninth Circuit held that Section 1346(b) did not provide the plaintiff a remedy against the United States and thus that Section 2679(b) did not bar the plaintiff from suing the employee directly. *Smith*, 885 F.2d at 655.

This Court reversed. The Court held that Section 2679(b) bars suit against an individual employee even if—as a result of one of Section 2680's exceptions—"the FTCA itself does not provide a means of recovery." *Smith*, 499 U.S. at 166. The Court supported its construction of Section 2679(b) by referring to Section 2679(d). That section provides that, if a tort suit is brought against a federal employee who was acting within the scope of his employment, the United States is to be substituted as the defendant, see 28 U.S.C. 2679(d)(1), (2) and (3), and the suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) * * * and shall be subject to the limitations and exceptions applicable to those actions," 28 U.S.C. 2679(d)(4). The Court reasoned that the "limitations and exceptions" language in Section 2679(d)(4) encompasses the Section 2680 "exceptions" and shows that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166. In other words, Section 2679(b)(1)'s phrase "remedy * * * provided by section[] 1346(b)" encompasses FTCA actions subject to dismissal under Section 2680.

Respondent's interpretation of the judgment bar cannot be reconciled with *Smith's* construction of Section 2679(b)(1) and (d)(4). The operative text of the provisions is parallel, and there is no basis for interpreting them so differently. Just as the phrase "[t]he remedy * * * provided by section[] 1346(b)" in Section 2679(b)(1) and the phrase "action against the United States filed pursuant to section 1346(b)" in

Section 2679(d)(4) include cases in which a claim brought under Section 1346(b) is ultimately precluded by Section 2680, so too does the judgment bar's phrase "an action under section 1346(b)" include cases brought under Section 1346(b) that are later determined to be foreclosed under Section 2680. *Smith* forecloses respondent's effort to limit the reach of the judgment bar in this fashion.

B. Section 2680 Does Not Exempt Categories Of FTCA Cases From The Judgment Bar

Respondent also argues (Br. in Opp. 28-31) that the "plain text" and "simple words" of Section 2680 itself exempt Section 2680 dismissals from the scope of the judgment bar. That contention relies upon Section 2680's introductory language stating that "[t]he provisions of this chapter"—*i.e.*, Chapter 171 of Title 28 of the United States Code—"shall not apply to" any of the types of claims expressly identified in Section 2680(a)-(n). 28 U.S.C. 2680. Respondent reasons (Br. in Opp. 28) that because the FTCA judgment bar is one of the "provisions of this chapter," that bar does not apply to FTCA claims dismissed under Section 2680. He is mistaken.

1. As explained above, *Smith* expressly held that Section 2679(b) applies to claims that fall within the enumerated exceptions to FTCA liability set forth in 28 U.S.C. 2680. *Smith*, 499 U.S. at 161-162, 165-167. But Section 2679 appears in Chapter 171 of Title 28, just like the judgment bar. *Smith*'s holding is thus incompatible with respondent's argument that Section 2680 renders the enumerated claims exempt from all of "[t]he provisions of this chapter."

2. To square his interpretation of Section 2680 with *Smith*, respondent invokes the FTCA's history. He

points out (Br. in Opp. 30) that Section 2679(b) was enacted as part of the Westfall Act in 1988, and he argues that it should therefore not be considered one of "[t]he provisions of this chapter" referred to in Section 2680. Instead, respondent appears to suggest (*id.* at 31) that the only "provisions of this chapter" that count for purposes of Section 2680 are those that were "part of the FTCA as originally enacted." His argument—which began as an effort to implement Section 2680's "simple words" (*id.* at 29)—thus ends up rewriting the statutory phrase "[t]he provisions of this chapter" to mean "[t]he provisions of this chapter, *but only insofar as they appeared in the original FTCA*." That contention fails as a textual matter, and it also contravenes the principle that statutory provisions should be interpreted as a coherent whole, even when they have been enacted at different times. See, *e.g.*, *Bilski* v. *Kappos*, 561 U.S. 593, 607-608 (2010).

Respondent's argument also fails on its own terms. The FTCA was originally enacted as Title IV of the Legislative Reorganization Act of 1946. See ch. 753, 60 Stat. 812-814, 842-847. What is now Section 2680 appeared in Section 421 of that Act, and the introductory language that respondent now relies upon stated that "[t]he provisions *of this title* shall not apply to [the specifically enumerated exceptions]." § 421, 60 Stat. 845-846 (emphasis added); see App., *infra*, 14a. Crucially, Section 421's reference to "this title" encompassed the FTCA in its entirety. Respondent's analysis of Section 2680 can thus be correct only if Congress intended to exempt the types of claims enumerated in that provision from all other provisions of the original FTCA.

That is not a plausible understanding of Congress's intent. Other FTCA provisions defined key statutory terms, mandated that the Federal Rules of Civil Procedure govern FTCA cases, and authorized litigants to appeal unfavorable FTCA decisions to either the circuit courts of appeals or the Court of Claims. See §§ 402, 411, 412, 60 Stat. 842-845; App., *infra*, 10a-14a. There is no reason to believe that Congress would have rendered those provisions inapplicable to FTCA cases involving claims falling within Section 2680's enumerated exceptions.

The legislative history also makes clear that Section 423 of the original FTCA—the precursor to Section 2679(a)—was understood to apply in cases involving the types of claims exempted from the FTCA under what is now Section 2680. See § 423, 60 Stat. 846; App., *infra*, 16a. In 1942, Assistant Attorney General Francis Shea provided Congress with a written analysis of the provision that eventually became Section 423. *1942 Hearing* 29. His analysis expressly stated that that provision would apply even with respect to claims falling under "the exceptions of the act [*i.e.*, the Section 2680 exceptions]." *Ibid.*

Respondent is therefore mistaken to believe that either Section 2680 or its predecessor in the original FTCA was ever understood to exempt the identified claims from all of the FTCA's other provisions. The better reading of Section 2680—and the only reading consistent with *Smith*—is that Section 2680's introductory "shall not apply" language both exempts the enumerated categories of tort claims from the FTCA's waiver of sovereign immunity and imposes substantive restrictions on the tort liability of the United States. But Section 2680 does not exempt those categories of

claims from other FTCA provisions—such as Section 2679(b) or the judgment bar—that expressly limit the remedies that tort claimants may pursue outside of the FTCA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346(b) provides:

United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

2. 28 U.S.C. 2674 provides:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual

under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

3. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

4. 28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject

matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therin to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the

incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under

the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provision of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

5. 28 U.S.C. 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an action or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this

chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of quarantine by the United States.

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[1] So in original

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

6. Federal Tort Claims Act, ch. 753, Tit. IV, 60 Stat. 842 provides in pertinent part:

* * * * *

DEFINITIONS

SEC. 402. As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

* * * * *

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United

States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

PROCEDURE

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act

of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

REVIEW

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

(b) Sections 239 and 240 of the Judicial Code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

* * * * *

EXCEPTIONS

SEC. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46,

secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

* * * * *

EXCLUSIVENESS OF REMEDY

SEC. 423. From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under part 3 of this title, and the remedies provided by this title in such cases shall be exclusive.

* * * * *

No. 15-109

IN THE

Supreme Court of the United States

JERMAINE SIMMONS, *et al.*,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") provides that, for certain enumerated categories of claims, the Act's "provisions"—including its jurisdictional grant to the district courts, 28 U.S.C. § 1346(b)—"shall not apply." 28 U.S.C. § 2680. One of those provisions states that a "judgment" entered in an action "under section 1346(b)" "bar[s]" an action against federal employees by reason of the same subject matter. *Id.* § 2676.

If a tort claim against the Government is dismissed for lack of subject-matter jurisdiction because it falls within the scope of § 2680:

(i) does the dismissal trigger the § 2676 judgment bar, even though § 2676 does "not apply" to claims encompassed by § 2680;

(ii) is the dismissed action "under section 1346(b)," even though that jurisdictional grant likewise does "not apply" to claims encompassed by § 2680; and

(iii) is the dismissal a "judgment" that "bar[s]" an action against the employee, even though the dismissal otherwise lacks any claim-preclusive effect?

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STATEMENT

Petitioners are officers at a federal prison where Respondent Walter Himmelreich served part of a sentence for production of child pornography. He filed this action against them (and others) under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they violated his Eighth Amendment rights by allowing another inmate, who threatened to "smash" a pedophile if released from segregated confinement, to nonetheless return to the general prison population. Just hours later, the inmate kept his word and violently assaulted Himmelreich, causing serious injuries. In an earlier appeal, a unanimous Sixth Circuit panel held that Himmelreich stated a viable *Bivens* claim based on Petitioners' deliberately indifferent failure to protect him from a "substantial risk of serious harm." Pet.App.29a-31a.

Petitioners now contend, however, that this action is precluded as a threshold matter, based on the dismissal for lack of subject-matter jurisdiction of a negligence claim Himmelreich had previously filed against the United States. Urging a dramatically broader construction of the FTCA's judgment bar than any Court of Appeals has adopted in the seventy years since Congress enacted it, Petitioners argue that because a court found that Himmelreich could not sue *the Government* for this harm, he is also precluded from suing the *responsible employees personally*. The Sixth Circuit correctly rejected that expansive view, which cannot be squared with either the statutory text or its purpose.

A. Statutory Background.

Before Congress enacted the FTCA, a person injured by a federal employee could either sue that employee personally under state tort law, or pursue a private congressional bill for compensation. But personal-capacity tort suits represented "a very real attack upon the morale of the services." *United States v. Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting legislative history). And private bills were a distraction for Congress and "notoriously clumsy." *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953).

Congress therefore enacted the FTCA—Title IV of the Legislative Reorganization Act of 1946—to provide a new remedy for those injured by employees acting within the scope of federal employment. Ch. 753, tit. IV, 60 Stat. 812, 842-47 (codified as amended at 28 U.S.C. §§ 1346(b), 2671-80). The Act created an "easy and simple" remedy against the United States, which conditionally agreed to subject itself to state tort law and "assume the obligation to pay damages for the misfeasance of [its] employees." *Dalehite*, 346 U.S. at 24; *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("Generally, [FTCA] cases unfold much as cases do against other employers who concede *respondeat superior* liability."). The Act waives sovereign immunity, subject to enumerated exceptions, where a private person would face tort liability in the state where the wrongful act occurred. This case turns on the relationships among three FTCA provisions.

First, the statute's jurisdictional provision, 28 U.S.C. § 1346(b), simultaneously functions as the cause of action and waiver of sovereign immunity. It confers subject-matter jurisdiction on district courts,

"[s]ubject to" the FTCA's other provisions, over claims:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Second, the Act includes a provision setting forth a series of claims that are *not* cognizable. "Congress qualified [§ 1346(b)'s] general waiver of immunity in 28 U.S.C. § 2680 by excepting from the Act claims arising from certain government activity." *United States v. Muniz*, 374 U.S. 150, 153 (1963). Section 2680 renders the FTCA, as a whole, inapplicable to certain categories of conduct; in the Code's language, the "provisions of this chapter and section 1346(b) of this title shall not apply to" a host of specified claims. The exceptions include claims based on exercise of a "discretionary function," 28 U.S.C. § 2680(a); claims arising from "negligent transmission" of mail, *id.* § 2680(b); claims alleging certain intentional torts, *id.* § 2680(h); and ten other categories of claims. Because these claims are excepted from, among other things, the Act's waiver of sovereign immunity and its jurisdictional grant in § 1346(b), courts have generally agreed with the Government's long-held position that the § 2680 carve-outs are jurisdictional in nature. *See Dalehite*, 346 U.S. at 24; Pet.Br.4-5 & n.1. Nothing in § 2680, however, precludes assertion of these claims against federal employees personally.

Third, the FTCA contains a so-called "judgment bar," which is the provision directly at issue here. The judgment bar is codified at 28 U.S.C. § 2676; it provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." In an early decision, this Court explained that this provision "makes a judgment against the United States a bar to action against the employee," thereby preventing any double recovery (*i.e.*, from the Government *and* the individual employee). *Gilman*, 347 U.S. at 511 n.2 (citing legislative history that, once "the Government has satisfied a claim ... that should, in our judgment, be the end of it").

In addition to these three original components of the FTCA, a more recent statutory amendment bears mention. In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, which among other things makes the FTCA the "exclusive" remedy for any injury arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Thus, claims against federal employees in their individual capacities are now expressly "precluded," even absent any prior FTCA judgment. *Id.* However, Congress carved out constitutional claims, *i.e.*, those under *Bivens*, from that exclusive-remedy provision. *Id.* § 2679(b)(2)(A); *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting this exception).

B. Respondent's Injuries And Subsequent Efforts To Obtain Relief.

1. At the time of the events at issue here, Respondent Himmelreich was incarcerated in federal prison in Ohio, serving a sentence for production of child pornography. JA.105. On October 16, 2008, another inmate, who was then being housed in the prison's Special Housing Unit as the result of a disciplinary violation, told prison officials that he was "not able to live with pedophiles" and that if he were released back to the general compound, he "will smash a pedophile." JA.119. Four days later, prison officials nonetheless released that inmate back to the general prison population. *Id.* As promised, just hours later, this inmate approached Himmelreich, "punched him in the face and then kicked him numerous times." *Id.* Himmelreich suffered serious injuries as a result of this assault and battery.

2. In February 2009, Himmelreich filed an administrative tort claim with the Federal Bureau of Prisons, recounting how he was "severely beaten" by the other inmate, suffering "internal bruising," "external injuries," "permanent ringing in the ears," persistent headaches, and "a pinched nerve." JA.98. In August 2009, the Bureau's regional counsel denied the claim, on the basis that there was "no evidence to suggest your assailant ever told staff he was going to assault you or that staff had any prior knowledge you were going to be assaulted." JA.93. That was false. As the Government's declarant later admitted, the assailant had told prison officials of his intent to "smash" a pedophile just days before he carried out that threat. JA.106, JA.119.

Following the Bureau's rejection, Himmelreich filed, in February 2010, a one-sentence complaint against the United States, styled as an "appeal" of the denial of his "administrative tort claim." JA.91. The civil cover sheet identified the case as a general "civil rights" matter and did not cite the FTCA. Dkt. 1-2, *Himmelreich v. United States*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010).

The Government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that the court "lack[ed] subject matter jurisdiction ..., because Plaintiff's claims fall within the discretionary function exception to the [FTCA]," 28 U.S.C. § 2680(a). JA.102. Its brief emphasized that, "[b]ecause Congress has not waived the sovereign immunity of the United States for claims that fall within the discretionary function exception, federal courts lack subject matter jurisdiction over such claims." JA.108; *see also* JA.105 (arguing that court "lacks subject matter jurisdiction"); JA.115 (same). In the Government's view, Himmelreich's claim fell within the FTCA's discretionary-function exception on the theory that prison officials exercise discretion and judgment when they house and protect inmates.

On November 18, 2010, the district court granted the motion to dismiss, agreeing that it "lacks subject matter jurisdiction over acts falling within the discretionary function exception" to the FTCA, and concluding that Himmelreich's claim fell within that statutory carve-out. Pet.App.47a, 49a-53a, 55a.

3. In October 2010—after the Government moved to dismiss Himmelreich's initial action, but before the court granted that motion—Himmelreich filed a separate, second action in the same court.

This second complaint was styled as a "complaint under *Bivens*"; it alleged, in relevant part, that the named defendants, including Petitioners in their personal capacities, knew about the intended assault and had violated Himmelreich's Eighth Amendment rights by failing to protect him. JA.41.

The district court initially dismissed this action *sua sponte* under 28 U.S.C. § 1915(e). Pet.App.34a, 38a. As to the Eighth Amendment claim, the court reasoned that Himmelreich had not alleged that the officials "acted with a sufficiently culpable state of mind." *Id.* 41a-44a. On appeal, however, the Sixth Circuit vacated and remanded in relevant part. *Id.* 23a-24a. It explained that Himmelreich alleged sufficient facts to show that the officers were aware of a "substantial risk" to Himmelreich or to a "class of prisoners" including him, and had "disregarded that risk by releasing [the other inmate] back into the general population." *Id.* 30a-31a.

On remand, however, the district court again dismissed the Eighth Amendment claim, this time on summary judgment. Pet.App.13a. The court first found Himmelreich's claims barred by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), for failure to exhaust administrative remedies within the Bureau of Prisons. Pet.App.16a-20a. The court also held that the FTCA judgment bar precluded the Eighth Amendment claim. Because that claim arose from the same assault and failure to protect as Himmelreich's earlier tort suit against the United States, which was dismissed "because the actions in controversy fell under the discretionary[-function] exception to the FTCA," the court concluded that § 2676 "bars any further action." Pet.App.21a.

4. Himmelreich appealed, JA.32, and the Sixth Circuit again vacated and remanded. Pet.App.1a-2a.

As to exhaustion, the panel invoked the exception for when an official's threats to retaliate make internal remedies "functionally unavailable." Pet.App.3a-4a. Because Himmelreich alleged that one defendant had placed him in administrative detention for filing his tort claim and threatened to transfer him if he continued to file grievances, a jury could fairly find that Himmelreich was "improperly prevented" from exhausting. Pet.App.4a.

Turning to the FTCA judgment bar, the panel reasoned that "dismissal for lack of subject-matter jurisdiction does not trigger" the bar. Pet.App.6a. "Put bluntly," the panel said, if a court lacks subject-matter jurisdiction, it cannot enter judgment "on the merits" and must dismiss the action; that is not a "judgment" within the meaning of § 2676. *Id.* (quoting 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3713 (3d ed. 1998)). And, as neither of the parties disputed, "courts lack subject-matter jurisdiction over an FTCA claim when the discretionary-function exception applies, as it did here." *Id.* 6a-7a. Hence the earlier dismissal of Himmelreich's tort claim against the Government did not trigger the judgment bar. *Id.*

5. Petitioners sought rehearing en banc, but no judge called for a response. Pet.App.11a.

SUMMARY OF ARGUMENT

Section 2676 requires injured plaintiffs to choose a defendant: the Government in *respondeat superior*, or the responsible employee personally. At the end of the day, there is only one injury, and there should be only one full and fair opportunity to seek redress. Accordingly, if the plaintiff litigates to "judgment" an action against the United States "under" the FTCA, that should ordinarily be the end of the matter.

The question here, however, is what happens if *there is no remedy* against the United States, because Congress has carved a category of claim out of the FTCA altogether, through the exceptions that § 2680 enumerates. The FTCA's text, context, and purpose all confirm that, under those circumstances, there is no bar to proceeding against the employee instead. To the contrary, that is the only legally viable option; precluding it would strip plaintiffs of *any* genuine opportunity to seek relief under *any* source of law.

I. First, *whatever* its scope, the judgment bar simply does not apply here. The plain text of § 2680 provides that all of the FTCA's other "provisions"—including its judgment bar—"shall not apply" to the set of claims carved out from the Act's sphere. Where, as here, a claim is dismissed on the basis of that statutory carve-out, § 2676 is thus inapplicable. Petitioners offer no coherent reading of the text that avoids this conclusion. Instead, they insist that this Court has previously departed from § 2680's plain meaning and that Congress could not have meant what it said. Neither is true. This Court must enforce Congress's clear direction that the judgment bar "shall not apply" to the claims wholly exempted from the Act.

II. By its own terms, too, the judgment bar is inapplicable. It is triggered only by a "judgment" in a suit "under section 1346(b)." But § 1346(b) does "not apply" to the claims enumerated in § 2680, and courts lack jurisdiction under § 1346(b) to adjudicate them. This means that the plaintiff's putative FTCA action was not "under" § 1346(b) in the first place. Moreover, a dismissal for lack of jurisdiction is not a "judgment" within the meaning of § 2676, as the bar's context amply confirms. The judgment bar supplements background *res judicata* principles, which protected the United States if a plaintiff sued its agents first but, in 1946, left servants exposed if a suit against their masters failed, even on the merits. Congress wrote the judgment bar to adopt a national rule allowing employees to equally benefit from the preclusive force of FTCA judgments. Given that context, "judgment" cannot include a jurisdictional dismissal, such as under § 2680, which carries no *res judicata* effect in the first place. In short, when a claim against the Government is dismissed because the court *has no power to adjudicate it*, that does not somehow shield the responsible federal employee.

III. Apart from ignoring the statute's text and its historical context and purpose, Petitioners' radically expansive understanding of the judgment bar would lead to absurd results—blocking *Bivens* suits even based on technical pleading defects such as filing in the wrong venue; encouraging personal-capacity suits; and arbitrarily depriving plaintiffs of relief to which they are legally, even constitutionally, entitled. For good reason, no Court of Appeals has adopted this unreasonably broad interpretation.

ARGUMENT

The FTCA's judgment bar is a sensible provision, serving intuitive ends. When plaintiffs have a choice of defendant, the bar prevents duplicative recoveries (if they sue the Government and win) and forbids second bites at the apple (if they sue the Government but lose on the merits). But the radically expansive construction of the bar pressed by Petitioners—that it is triggered by *any* dismissal, on *any* basis, of *any* tort claim against the Government, even if no such claim is even cognizable—is anything but sensible, and would yield absurd results. It cannot be squared with the statutory text or its purpose. That is why, tellingly, not one Court of Appeals has adopted that construction in the nearly seventy years since the law was enacted. This Court should not do so now.

I. UNDER THE PLAIN TEXT OF 28 U.S.C. § 2680, THE JUDGMENT BAR DOES "NOT APPLY" TO CLAIMS EXEMPTED FROM THE ACT.

Whatever the scope of the judgment bar itself, the provision is wholly inapplicable at the threshold. The FTCA states that its provisions "shall not apply" to the claims enumerated in § 2680. Those claims are thus carved out of the Act entirely. As such, if a claim asserted against the Government falls within a § 2680 exception, there is no waiver of immunity, no jurisdiction, no cause of action, no liability, and no relief—but also no bar to a non-FTCA claim, such as a constitutionally based *Bivens* suit against the employee. That plain reading makes good sense: If a claim is categorically carved out of the FTCA, injured parties should not be barred from pursuing *other* available forms of redress. And Petitioners have no way around § 2680's "shall not apply" language.

A. The Judgment Bar Does "Not Apply" To Claims Falling Within § 2680, And So Dismissals Under That Section Do Not Trigger The Judgment Bar.

There is no warrant, in this case, to explore the outer bounds of § 2676—the judgment bar itself—because another FTCA provision expressly provides that the judgment bar has no application here.

1. Specifically, § 2680 is entitled: "Exceptions." Its text provides that "[t]he provisions of this chapter and section 1346(b) of this title *shall not apply to*" over a dozen enumerated types of claims that are exempt altogether from operation of the Act. 28 U.S.C. § 2680 (emphasis added). The "chapter" to which § 2680 refers is chapter 171 of Title 28 of the Code. That chapter spans from § 2671 to § 2680—and includes § 2676, the judgment bar.

Thus, under the plain text of § 2680, these FTCA provisions "shall not apply to" any claim within the statutory carve-outs. And "shall" reflects "language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Various consequences follow from this. Section 1346(b) does "not apply" to these claims, and so there is no subject-matter jurisdiction over them. Section 2672 does "not apply" to them, and so federal agencies are not authorized to compromise or settle them. Section 2673 does "not apply," and so claims falling within the exceptions need not be reported to Congress. Section 2674 does "not apply," and so the United States bears no tort liability for these claims. Section 2675 does "not apply," and so there is no duty to exhaust administrative remedies. Section 2678 does "not apply," and so neither the 25% maximum contingency fee nor its criminal penalty applies.

As relevant here, the crucial proposition is that § 2676 does "not apply" to § 2680 claims either. That means that a claim falling within one of the § 2680 exceptions does not trigger the judgment bar. That is, dismissal of such a claim (because it falls outside the scope of the FTCA) does not create any bar to a subsequent suit against the responsible employee, because the provision that generally imposes such a bar does "not apply" to the claim at issue.

The last time the scope of § 2676 was presented to this Court, Justices raised this point *sua sponte* at the oral argument. *See* Tr. of Oral Arg. at 11, *Will v. Hallock*, 546 U.S. 345 (2006) (No. 04-1332) ("Justice Stevens: ... [T]he introductory language of 2680 is that provisions of this chapter shall not apply to such cases. And is it not true that 2676 is in this chapter, and does it not, therefore, follow that 2676 does not apply to this case?"). As Justice Breyer observed, "the language does seem to say it." *Id.* at 15.

Indeed it does, directly and plainly. And as this Court has long emphasized, "time and again," courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, if statutory language has "a plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), the judicial inquiry "ceases," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "The plain meaning of legislation should be conclusive," certainly absent a compelling reason to believe that Congress intended something other than what it said. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

This Court recently applied those principles to identical "shall not apply" language in a related provision. *See Levin v. United States*, 133 S. Ct. 1224 (2013). That provision states that one of the § 2680 exceptions "shall not apply" to medical malpractice claims against certain federal personnel. *Id.* at 1227. This Court applied that language as written, allowing malpractice claims that would otherwise be barred by § 2680; it called the question "not difficult" in light of the law's "plain reading." *Id.* at 1232 & n.6. The analysis here is equally simple.

2. The plain text of § 2680 is "coherent and consistent" with the "statutory scheme." *Ron Pair*, 489 U.S. at 240, 242. If a claim exempted by § 2680 cannot be pursued against the Government, a plaintiff who nonetheless futilely asserts that claim against the Government should not be precluded from suing the *proper* defendant instead.

As this Court explained in *Will v. Hallock*, the judgment bar does not "reflec[t] a policy that [federal employees] should be scot free of any liability." 546 U.S. 345, 354 (2006). Rather, it is motivated by the same policy concern as *res judicata—viz.*, "avoiding duplicative litigation." *Id.* The FTCA subjected the *United States* to state tort liability, but did not eliminate any extant right to sue federal *employees* on the same theories. *See Westfall v. Erwin*, 484 U.S. 292 (1988).[1] The Act essentially gave plaintiffs

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[1] The Westfall Act later did eliminate that right, which is why the judgment bar today precludes only *Bivens* suits. But *Bivens* had not yet been decided when the FTCA was enacted; Congress was focused on state-law tort suits. *See* Pet.Br.6.

a choice of defendant. But in doing so, it created a risk that plaintiffs would seek to recover twice, or take two bites at the apple. Congress addressed those risks in the judgment bar—and in the Act's parallel release bar, 28 U.S.C. § 2672, which bars claims by plaintiffs who accept federal *settlements*.

That core concern about "duplicative litigation," however, exists only if duplicative remedies exist. A plaintiff hurt in a car accident with a government driver, for example—the scenario "[u]ppermost in the collective mind of Congress," *Dalehite*, 346 U.S. at 28—should not recover twice, once from the United States and then again from the driver personally. *See Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 9 (1942) (statement of Francis Shea, Assistant Att'y Gen.) [hereinafter *1942 Hearing*] ("If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, ... he should not be able to turn around and sue the driver of the truck."). Nor, if that plaintiff loses his FTCA suit because, for example, the court finds that the driver was not negligent, should he be able to try an identical tort theory against the driver individually. Those are the classic objectives of the judgment bar.[2]

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[2] One might have expected *res judicata* rules to address these problems. But as detailed below, the Restatement view at the time of the FTCA's enactment was that a servant could not invoke *res judicata* based on a judgment in favor of his master. The judgment bar filled that hole. *See infra* Part II.B.2.

Those concerns are not implicated when there *are no* duplicative causes of action. When a claim falls within the scope of § 2680, it is "carve[d] out" from the FTCA entirely. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 215 (2008). There is no cognizable cause of action against the Government. Thus, unlike the quintessential case of the plaintiff whose FTCA action fails because he cannot establish negligence, a § 2680 dismissal says nothing about the viability of any cause of action against the employee. The court is instead advising the plaintiff that he sued the *wrong party*. In that context, § 2680's "shall not apply" language sensibly withholds application of the judgment bar, allowing the plaintiff to proceed against the *correct* defendant. Such a plaintiff is not taking a second bite at the apple; he is trying an orange after being told that apples are out of season. *Cf. House v. Mullen*, 89 U.S. 42, 46 (1875) (if "bill is dismissed for misjoinder of parties," plaintiff "should be at liberty to bring another bill, with proper parties, in regard to the subject-matter of the first").

Put another way, a § 2680 dismissal implies only that no remedy exists against the United States under the FTCA. Far from *condemning* a tort claim against the responsible employee, that ruling is *irrelevant* to it. That lack of commonality—and absence of true duplication between alternative claims or defendants—was good reason for Congress to except § 2680 claims from the judgment bar.

Against all this, Petitioners argue that applying the judgment bar would advance federal interests by avoiding litigation costs. Pet.Br.23-28. Maybe so, but given the plain text of § 2680, Petitioners must show not that *applying* the judgment bar would be

rational, but that *exempting* § 2680 dismissals from the judgment bar would be *irrational*, such that the plain text so providing should be ignored. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (plain text must be enforced "where the disposition required by the text is not absurd"). Petitioners do not come close to making that demanding showing.

3. Here, of course, Himmelreich's claim falls within an exception under § 2680, and indeed his action against the United States was dismissed on that very basis. Pet.App.48a-53a. Accordingly, the judgment bar does "not apply" to that claim, and the dismissal of that claim cannot trigger the bar.

B. Petitioners Offer No Coherent, Plausible Alternative Construction Of The Text.

Petitioners offer no plausible interpretation of § 2680's "shall not apply" language that would preserve application of the judgment bar to claims like Respondent's. Instead, Petitioners argue that this language cannot mean what it says. Their arguments fail. Nothing in this Court's prior decisions or elsewhere in the FTCA undermines § 2680's express direction that the Act's provisions, including the judgment bar, "shall not apply" to the exempted claims.

1. Petitioners first cite *United States v. Smith*, 499 U.S. 160 (1991). *Smith* never addressed the "shall not apply" language of § 2680, but Petitioners argue that if § 2680 means what it says, that case's holding was wrong. Pet.Br.48-50. Their argument goes as follows: Under a provision enacted by the Westfall Act, the FTCA is the "exclusive" remedy "against the employee" for claims arising under state

law, and any other such action is "precluded." 28 U.S.C. § 2679(b)(1). *Smith* held that this provision bars state-law tort suits against the employee even for claims falling within § 2680. 499 U.S. at 166-67. Petitioners argue that this cannot be true if § 2680 really renders inapplicable all other provisions of the FTCA. If § 2680's "shall not apply" language means what it says, they argue, then the exclusive-remedy provision would not apply either, and state tort remedies would remain available for those claims—contrary to *Smith*'s holding.

The supposed conflict does not exist. Petitioners' argument ignores crucial historical and textual distinctions between § 2676 (the judgment bar) and § 2679(b) (the exclusive-remedy provision at issue in *Smith*). Those distinctions establish that there is no conflict between reading § 2679(b) to preclude all state-law tort claims against federal employees—including, as another provision of the Westfall Act expressly directs, those arising from conduct within § 2680's "exceptions"—while at the same time recognizing that § 2676 does "not apply" to *Bivens* claims arising from that conduct.

a. First, the Westfall Act and its exclusive-remedy provision were not enacted until forty years *after* § 2680, which originally stated that the provisions "*of this title*" "shall not apply" to the enumerated claims. Ch. 753, § 421, 60 Stat. 812, 845 (emphasis added). As Petitioners concede, "title" referred to Title IV of the Legislative Reorganization Act of 1946—the FTCA *as originally enacted*. Pet.Br.51; *see also* ch. 753, § 401, 60 Stat. at 842 ("This title may be cited as the 'Federal Tort Claims Act'.") That title included the judgment bar. Ch.

753, § 410(b), 60 Stat. at 844. But it did not include the exclusive-remedy provision—which was enacted decades later as part of an entirely different law, *see* Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988).

Accordingly, because the judgment bar *was* part of the original "title" that Congress directed in 1946 "shall not apply" to the exempt claims, that bar *does not* apply to claims falling within § 2680's scope. But since the § 2679(b) exclusive-remedy provision *was not* among the original provisions of the "title," that provision *does* apply to § 2680 claims. There is thus no conflict between *Smith* and the plain text of § 2680, as originally enacted.

It is true that, when the FTCA was later codified, some of its provisions were distributed to 28 U.S.C. § 1346(b), while others were sent to chapter 171 of Title 28. In the codified version of the Act, § 2680's language was therefore altered, to provide that the "*provisions of this chapter and section 1346(b) of this title*" shall not apply to the enumerated claims. And the Westfall Act's exclusive-remedy provision was later added to "this chapter," chapter 171 of Title 28. It is only by looking to that *codified* version of § 2680 that one encounters the supposed inconsistency Petitioners identify. Pet.Br.50.

This is hardly the first time that statutory cross-references have been muddled by later codification. Courts, however, have consistently adhered to the venerable rule that "the Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam). In one case, for example, Congress enacted a statute governing railroads "subject to part I of the Interstate Commerce Act"; the Code

translated that reference as those "subject to subchapter I of chapter 105 of title 49," based on the then-placement of the Interstate Commerce Act. *Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1074-76 (D.C. Cir. 1995). But some parts of that Act were later moved elsewhere, leading to a real practical difference between the two versions of the law. The D.C. Circuit held that the original Statutes at Large prevailed over the Code, thereby subjecting further railroads to regulation. *Id.* Similarly, in *Five Flags Pipe Line Co. v. Department of Transportation*, the court confronted a Code provision allowing direct appellate review of regulations promulgated "under this chapter," even though the original session law authorized such review only for regulations "under this Act." 854 F.2d 1438, 1440 (D.C. Cir. 1988). Again, the court followed the original text, not the Code. And because the regulation at issue had been promulgated under the "chapter" but not under the "Act," the court lacked jurisdiction. *Id.* at 1442.

Cheney and *Five Flags* involved provisions of the Code that had not been enacted into positive law, but courts apply a similar rule "even where," as here, "Congress has enacted a codification into positive law." *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). That is, courts do not assume that Congress intended such consolidation to effect any "changes of law or policy," unless that intent is "clearly expressed." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (interpreting Title 28). Indeed, when it enacted Title 28 of the Code into positive law, Congress expressly warned that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28 ... in

which any section is placed." Ch. 646, § 33, 62 Stat. 869, 991 (1948). So, while the exclusive-remedy provision is found in the "*chapter*" of Title 28 that the *Code* says does "not apply" to § 2680 claims, it is not in the "*title*" that the *Statutes at Large* say does "not apply." And because the latter governs in discerning Congress's intent, the "shall not apply" directive was simply irrelevant to the interpretation of § 2679(b) in *Smith*. Here, it is dispositive.

b. Beyond this historical distinction, Petitioners' argument ignores crucial *textual* differences between § 2676 and § 2679(b)—including the very language *Smith* relied on in holding that the latter reaches claims enumerated by § 2680.

As *Smith* reasoned, the express language of the Westfall Act's exclusive-remedy provision makes clear that the provision extends to claims arising from conduct within § 2680's exceptions. The Act provides that when the Attorney General certifies that a federal employee named as a defendant was acting in the scope of his employment, the United States shall be substituted as the defendant and the suit "shall proceed in the same manner" as any FTCA suit and "shall be *subject to the* limitations and *exceptions* applicable to those actions." 28 U.S.C. § 2679(d)(4) (emphasis added). The cited "exceptions" are those expressly "designated as such under § 2680." *Smith*, 499 U.S. at 166. The Westfall Act's legislative history confirmed this straightforward reading of the text, emphasizing that "any claim against the government that is precluded by the exceptions set forth in Section 2680 ... also is precluded against an employee." *Id.* at 167 n.9, 175 (quoting committee report). Thus, as *Smith*

concluded, "Congress recognized"—and, indeed, directly ordered—that its new provisions *would* govern suits falling within § 2680's "exceptions"—notwithstanding that section's longstanding "shall not apply" language. *Id.* at 166.

Congress was entitled to so provide. After all, a "later enactment governs" over an earlier one, *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring), and § 2679(d)(4)'s language leaves no doubt that Congress intended to apply § 2679(b) even to claims falling within § 2680's "exceptions." Insofar as there is any tension between that clear directive and § 2680's "shall not apply" command, it was incumbent upon this Court to look to the specific language of the *new* provisions for elucidation of legislative intent. That language squarely answered the question.

By contrast, there is *no* countervailing evidence from any other provision of the FTCA that Congress expected the judgment bar to be triggered by claims within § 2680's reach. Given the textual differences, Congress's intent for § 2679(b) to govern § 2680 claims in no way suggests that Congress meant for § 2676 to be triggered by § 2680 claims. The two inquiries are analytically distinct. And the text points in a different direction for each.

c. These historical and textual distinctions comport with Congress's distinct "fundamental purpose[s]" in enacting the FTCA and the Westfall Act respectively. *Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990). As explained, Congress enacted the FTCA to *expand* the avenues of relief available to persons injured by federal employees. *Supra* pp. 2, 14-16. By contrast, it

crafted the Westfall Act to *eliminate* a class of existing remedies, *see* Pub. L. No. 100-694, § 2(b), 102 Stat. at 4564 ("[i]t is the purpose of this Act to protect Federal employees from personal liability for common law torts"), with the important caveat that this narrowing of available remedies "does not extend or apply to" constitutionally based *Bivens* claims, 28 U.S.C. § 2679(b)(2); *see also supra* p. 4.

The Court's interpretation of the Westfall Act in *Smith* furthered that statute's employee-protecting purpose. Petitioners' argument here, by contrast, would thwart both the remedy-enhancing purposes of the original FTCA and the Westfall Act's specific intention to leave *Bivens* claims undisturbed. Nothing in *Smith* supports such a perverse result.

* * *

In short, and for these reasons, *Smith* did not *sub silentio* write "shall not apply" out of § 2680. Those words do not overcome manifest congressional intent as to application of the Westfall Act's later-enacted exclusive-remedy provision, but they directly foreclose application of § 2676 in cases like this.

2. Petitioners next argue that the "shall not apply" command of § 2680 cannot mean what it says because another section of the FTCA, one that was part of the original enactment and is now codified at 28 U.S.C. § 2679(a), was "understood to apply" to claims exempted by § 2680. Pet.Br.52. Actually, just the opposite is true, proving again that Congress meant exactly what it said.

Section 2679(a) provides that for any agency that is authorized "to sue and be sued in its own name," such authorization "shall not be construed" to allow

suit on claims "cognizable under section 1346(b)." In other words, for agencies whose sovereign immunity had been already waived by sue-and-be-sued clauses, Congress "limit[ed] the force" of those waivers, retracting them "in the context of suits for which [Congress] provided a cause of action under the FTCA." *Loeffler v. Frank*, 486 U.S. 549, 561-62 (1988). Therefore, "if a suit is 'cognizable' under § 1346(b), the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its own name,' despite the existence of a sue-and-be-sued clause." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

Contrary to Petitioners' theory, but consistent with § 2680's "shall not apply" instruction, § 2679(a) does *not* apply—and was *always understood* not to apply—to claims exempted by § 2680. The FTCA's retraction of agency sue-and-be-sued authorizations extends only to claims remediable under the FTCA—and not to claims carved out by § 2680. As such, agencies with sue-and-be-sued clauses *can indeed* be sued on the claims listed in § 2680, all else being equal—because those clauses waive immunity and § 2679(a) does not claw back those waivers.

Proving this point, some of the § 2680 exceptions categorically carve out from the FTCA *any* claims arising from the activities of certain federal agencies, such as the Tennessee Valley Authority ("TVA"), the Panama Canal Company, and certain federal banks. *See* 28 U.S.C. § 2680(l)-(n). Congress enacted those exceptions not to provide absolute immunity to those select agencies, but because "adequate remedies [we]re already available"—in direct suits under sue-and-be-sued clauses. H.R. Rep. No. 79-1287, at 6 (1945); S. Rep. No. 79-1400, at 33 (1946).

For example, the "principal reason" for the TVA exception was that the TVA "was susceptible to suit prior to the enactment of the [FTCA]," so the FTCA's remedy was "unnecessary" as to it; the TVA therefore "asked to be exempted." *Brewer v. Sheco Constr. Co.*, 327 F. Supp. 1017, 1018 (W.D. Ky. 1971); *see also* 92 Cong. Rec. 6563-64 (1946) (exception meant to ensure that "pending bill does not interfere with" existing "rights to file claims against" the TVA). Similarly, when Congress added a § 2680 exception for claims arising out of the activities of the Panama Railroad Company (as the Panama Canal Company was then known), *see* ch. 340, 63 Stat. 444 (1949), it did so because it wished to restore the Company's prior amenability "to suit on all claims, tort as well as contract, in the same manner as any private corporation." H.R. Rep. No. 81-830, at 2 (1949). Far from believing that § 2679(a) would apply to the newly excepted claims, Congress intended the § 2680 exception to preclude application of the sue-and-be-sued clawback to the Company. *See id.* at 2, 4 (letter from Secretary of Army explaining that one reason for this exception was to make inapplicable the § 2679 exclusive-remedy provision).

Consistent with that intent, courts—including this one—have uniformly held for decades that these entities *can* be sued in tort pursuant to their sue-and-be-sued clauses, even though the FTCA exempts the United States from liability for their acts. Thus, in *Gardner v. Panama Railroad Co.*, this Court read the exception for the Panama Railroad Company as allowing suit "directly against the company," as had been the case "before passage of the [FTCA]." 342 U.S. 29, 31-32 (1951) (per curiam). Congress did

not mean to "cut off, summarily," all tort remedies against the company. *Id.*, *accord De Scala v. Panama Canal Co.*, 222 F. Supp. 931, 934 (S.D.N.Y. 1963) ("Congress ... recognized that the Company had always been and continued to remain suable.").

As to the TVA, likewise, *Smith* observed that "[c]ourts have read" its sue-and-be-sued clause "as making the TVA liable to suit in tort," "independent of the FTCA." 499 U.S. at 168-69; *see also North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008); *Wayne v. TVA*, 730 F.2d 392, 397 (5th Cir. 1984); *Queen v. TVA*, 689 F.2d 80, 85 (6th Cir. 1982). And courts have reached the same result for the federal banks exempted by § 2680(n). *Sterrett v. Milk River Prod. Credit Ass'n*, 647 F. Supp. 299, 301-02 (D. Mont. 1986); *Tooke v. Miles City Prod. Credit Ass'n*, 763 P.2d 1111, 1113 (Mont. 1988).

All of this makes perfect sense if § 2680's "shall not apply" language is given its ordinary meaning: Because § 2679(a) does "not apply" to claims wholly exempt from the FTCA under § 2680, entities like TVA remain suable directly. Section 2679(a) does not make "exclusive" a *non-existent* FTCA remedy.

Yet on Petitioners' view, § 2679(a) withdraws the sue-and-be-sued clauses for torts against TVA and the Panama Canal Company—and, at the same time, § 2680 exempts their activities from FTCA remedies entirely. That makes nonsense of the scheme, leaving no tort remedies *at all* against these entities. It undermines clear legislative intent that these agencies *would* remain suable, and indeed that the § 2680 exceptions were appropriate precisely *because of* that exposure. And it contradicts all the caselaw above, including this Court's *Gardner* holding.

Against all of this, Petitioners invoke an ambiguous analysis in the legislative history (Pet.Br.52), in which Assistant Attorney General Shea described § 2679(a) as "plac[ing] torts of 'suable' agencies ... upon precisely the same footing as torts of 'nonsuable' agencies" and suggested that the FTCA exceptions would therefore apply to torts of suable agencies. *1942 Hearing*, *supra*, at 29. Of course, Petitioners' interpretation of this analysis is contradicted by the excepted agencies' continued amenability to suit, as discussed above. Moreover, in *Meyer*, this Court "reject[ed] this reading of the statute," holding that § 2679(a) does *not* preclude *Bivens* claims against agencies subject to sue-and-be-sued clauses, notwithstanding that this result "runs afoul of" Congress's purported desire to place all agencies on "the same footing." 510 U.S. at 478-79. Similarly, only suable agencies are subject to potential liability on claims exempted by § 2680, for which Congress likewise did not "provid[e] a cause of action under the FTCA." *Loeffler*, 486 U.S. at 562.[3]

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[3] Of course, sue-and-be-sued agencies will not necessarily face *liability* for the claims exempted by § 2680. For example, an independent statute directs that all "tort claims arising out of activities of the Postal Service" are subject to the FTCA. 39 U.S.C. § 409(c). That provision—which would be redundant of § 2679(a) on Petitioners' reading—incorporates § 2680's exemptions, including for claims alleging negligent mail transmission, as to *all* tort claims against the Service. *See Davric Me. Corp. v. U.S. Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001) (applying § 409(c) to bar such a claim). Further, sue-and-be-sued clauses waive immunity, but do not answer the "analytically distinct" question whether there exists "an avenue for relief." *Meyer*, 510 U.S. at 484 (citing *United States v. Mitchell*, 463 U.S. 206, 218 (1983)). Finally, sue-and-be-sued

If anything, the interplay between § 2679(a) and § 2680 thus proves again that the latter's "shall not apply" instruction was no mistake.

3. Finally, Petitioners object that Congress could not have intended to exempt § 2680 claims from the FTCA's *definitional* provision or from other procedural rules included within the original "title" that § 2680 said "shall not apply" to its claims. Pet.Br.52. That is not persuasive.

As to the FTCA's definitional provision, *see* ch. 753, § 402, 60 Stat. at 842-43, the answer is simple. These are definitions of *statutory terms*. They do not apply or attach to "claims" at all, so there is nothing for § 2680 to render inapplicable. That is, § 2680 directs that the Act's provisions "shall not apply" to certain "claim[s]." But the definitions do not speak to "claims"; they speak to statutory terms.

As for the procedural provisions, it makes perfect sense that the rules for "counterclaim and set-off," for "interest upon judgments," and for "payment of judgments," *see* ch. 753, § 411, 60 Stat. at 844, would "not apply" to § 2680 claims, since courts do not even have *jurisdiction* over them. No set-offs, interest, or judgments to be paid would ever arise.

(continued...)

clauses do not strip common-law immunities, which protect against some of the claims exempted by § 2680. Pet.Br.27. For example, courts allow sue-and-be-sued agencies like the TVA to assert a common-law "discretionary function" immunity, even though § 2680(a)—which codified that rule for FTCA claims—does not itself apply. *Queen*, 689 F.2d at 85; *Brewer*, 327 F. Supp. at 1018-19; *Atchley v. TVA*, 69 F. Supp. 952, 955 & n.4 (N.D. Ala. 1947).

That leaves only the Act's special provision—no longer extant—for appeal, if all parties consented, to the Court of Claims instead of the Court of Appeals. Ch. 753, § 412, 60 Stat. at 844-45 (repealed 1982). Petitioners say "[t]here is no reason to believe" Congress meant to exempt § 2680 dismissals from that alternative route for appeal. Pet.Br.52. But Congress may have wanted a special role for the claims court in reviewing *liability* determinations, while leaving the circuit courts to review threshold determinations of the FTCA's inapplicability. *Cf. 1942 Hearing*, *supra*, at 17-23 (debating role of Court of Claims). In any event, it is hardly absurd to send § 2680 dismissals, like most district-court orders, to regional circuits for review. Petitioners' speculation about congressional intent in this limited respect is no basis for wholesale disregard of § 2680's text.

4. And wholesale disregard is what Petitioners seek. Their passing effort to construe § 2680's "shall not apply" language does not pass the laugh test.

The "better reading" of those words, Petitioners offer, is that *only* the FTCA's waiver of immunity and imposition of liability do "not apply" to § 2680 claims. Pet.Br.52. But Congress did not say there shall be *no liability* for the exempted claims, or *no jurisdiction* over them. "Had that been Congress's intention, it could easily have used the formulation just suggested." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). Congress broadly provided that the title *as a whole* "shall not apply" to these claims. On its face, that sweeps in the judgment bar. *See Levin*, 133 S. Ct. at 1232 (rejecting Government's "most unnatural" reading of "shall not apply" to mean "does apply").

The only "advantage" of Petitioners' reading is that it would shield § 2680 claims from application of all the FTCA provisions that *burden* the Government (*i.e.*, its immunity waiver and imposition of liability) while fully applying the FTCA provisions that *benefit* the Government (*i.e.*, the sue-and-be-sued clawback and judgment bar). Pet.Br.53. Indeed, Petitioners' "better reading" must have been gerrymandered to serve precisely that objective, as it has no grounding in the statutory text—and does not pretend to. This Court rejected that sort of self-serving "parsing" in *Meyer*, 510 U.S. at 479, and should do the same here.

* * *

Petitioners ask this Court to apply what they say is the judgment bar's plain text. But they ignore the plain text of § 2680, which directs that the judgment bar has no application to claims like Respondent's. By freeing plaintiffs to proceed against *legally viable* defendants when the United States has categorically disclaimed liability, that natural reading makes good sense and avoids absurd results. This Court should give effect to plain text *throughout* the FTCA.

II. Section 2676 Also Makes Clear That Section 2680 Dismissals Do Not Trigger The Judgment Bar.

Even looking only to the text of § 2676 itself, no judgment bar arises when a putative FTCA claim is dismissed under § 2680. *First*, Petitioners agree that the FTCA's jurisdictional provision, § 1346(b), does "not apply" to § 2680 claims and that § 2680 dismissals are jurisdictional in nature. It follows that a § 2680 dismissal is not a judgment in an action "under section 1346(b)," as § 2676 requires.

Second, § 2676 extends to federal employees the *res judicata* "bar" of an FTCA "judgment" for or against the United States—but it does not invest otherwise non-preclusive dismissals with dispositive force. Accordingly, a jurisdictional dismissal under § 2680, which lacks *any* claim-preclusive effect, is not a "judgment" entitled to the extended *res judicata* "bar" afforded by § 2676. *Third*, even if dismissals under § 2680 were *not* jurisdictional, they reflect defenses personal to the Government, and so would not preclude a claim against a federal employee under the *res judicata* principles that § 2676 incorporates. Petitioners' contrary theory ignores the Act's context, defies basic *res judicata* principles, and is hardly compelled by statutory text.

A. Jurisdictional Dismissals Do Not Count As Judgments In Actions "Under" The FTCA's Jurisdictional Provision.

When a court dismisses a tort claim against the United States based on a § 2680 exception, that is not a judgment in an action "under" the FTCA's jurisdictional provision, § 1346(b). Quite the contrary: Such a dismissal is a ruling that a claim *cannot* be adjudicated under § 1346(b). It therefore does not trigger the judgment bar.

1. There is no dispute here that the exceptions to FTCA liability found in § 2680 are jurisdictional in nature. Section 1346(b) is the FTCA's "jurisdictional provision." Pet.Br.3. Absent that provision, no court would have power to hear tort claims against the United States. Moreover, "[s]overeign immunity is jurisdictional in nature," *Meyer*, 510 U.S. at 475, and so jurisdiction in FTCA actions also depends on § 1346(b)'s limited waiver of sovereign immunity, *id.*

at 475-77. Yet § 2680 expressly says that § 1346(b) "*shall not apply*" to claims within its exceptions. As Petitioners accordingly agree, the § 2680 exceptions thus "limit the subject-matter jurisdiction of district courts." Pet.Br.4; *see also Dalehite*, 346 U.S. at 24.

This is not just semantics. There are significant differences between mere elements of a claim, on one hand, and crucial jurisdictional facts, on the other. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-14 (2006). Among other things, the fact that the § 2680 exceptions are jurisdictional means that they are not waivable, a procedural boon the Government takes full advantage of. *See, e.g., Bolduc v. United States*, 402 F.3d 50, 54, 60-62 (1st Cir. 2005) (addressing "belated" invocation of § 2680(a) for this reason).

The Seventh Circuit alone holds that § 2680's exceptions are mere affirmative defenses, rather than jurisdictional limits. *See Collins v. United States*, 564 F.3d 833, 837-38 (7th Cir. 2009). But Petitioners do not defend the Seventh Circuit's approach, and for good reason: Unlike the FTCA's limitations provision, which is not linked to § 1346(b) and which this Court accordingly held last Term is not jurisdictional, *see United States v. Wong*, 135 S. Ct. 1625, 1633 (2015), § 2680 is expressly tied to § 1346(b) and carves out "classes of cases" from courts' "adjudicatory authority," perfectly fitting this Court's paradigm of a "jurisdictional" limit, *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004).

Anyway, whatever the proper treatment of the § 2680 exceptions in general, the Government here obtained dismissal of Respondent's claim under Rule 12(b)(1), contending that the district court "lack[ed] subject matter jurisdiction." JA.115. The court

agreed. Pet.App.49a. There is therefore no doubt that the "judgment" supposedly triggering § 2676 was indeed a dismissal for lack of jurisdiction.

2. Section 2676 applies to judgments in actions "under section 1346(b)." "The word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("meaning ... of certain words or phrases may only become evident when placed in context"). Here, "the most natural reading" is that § 2676 is triggered only by judgment in a suit that is "subject to" § 1346(b), *Ardestani*, 502 U.S. at 135—*i.e.*, one that *actually falls within its jurisdictional scope.*

Again, the idea is that plaintiffs should have one "full and fair opportunity" to seek relief. *Montana v. United States*, 440 U.S. 147, 153 (1979). But if the court has no power to adjudicate the claim because it is not within the court's jurisdiction, then "the action was not properly brought *under* the [FTCA] in the first place." *Hallock v. Bonner*, 387 F.3d 147, 155 (2d Cir. 2004) (emphasis added), *vacated on other grounds*, *Will*, 546 U.S. 345. The putative FTCA action was not, as it turns out, actually "under" § 1346(b). Dismissal of such an action thus ought not, and does not, preclude a distinct cause of action against a distinct defendant. *Supra* pp. 14-16; *see also* Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947) (contemporaneous scholarship agreeing with this reading of "under"); 3 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 16.13 (2015) (endorsing this interpretation).

Here, again, the "shall not apply" language of § 2680 is relevant, reinforcing this natural reading of "under." Petitioners concede that, whatever else, *§ 1346(b)* does "not apply" to § 2680 claims. Pet.Br.52. But if that is so, it follows that § 2680 claims are not brought "under" § 1346(b): An action dismissed because § 1346(b) does "not apply" is not an action "under section 1346(b)."

This Court has applied similar reasoning before, looking past the mere *label* of the action to ascertain whether it truly was under the applicable statute. In *Oklahoma Gas and Electric Co. v. Oklahoma Packing Co.*, for example, this Court confronted a provision that assigned constitutional claims to enjoin state officers to three-judge trial courts, with direct appeal to this Court over the final decree "in such suit." 292 U.S. 386, 390 (1934). Although the "allegations" in the case, "present[ed] on their face every prerequisite" required, this Court refused to hear the direct appeal: "[W]hen it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers, ... there was no longer any occasion for proceeding under" the provision at issue. *Id.* at 391. The Court thus looked to whether the claim *actually* implicated the jurisdictional grant, not just whether it so alleged.

Similarly, this Court's doctrine of "complete preemption" recognizes that even when a claim is pleaded under state law, it may "in reality" arise "under" federal law, thus allowing federal courts to exercise jurisdiction pursuant to 28 U.S.C. § 1331. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *accord Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

As these decisions show, a claim that on its face invokes a jurisdictional provision may not in fact trigger that provision or all of its consequences, *Okla. Gas*, 292 U.S. at 391, while a claim that facially disclaims a jurisdictional provision may yet trigger it, *Beneficial*, 539 U.S. at 8. Labels, in other words, do not always control. What matters is the context and the purpose of the jurisdictional provision.

By the same token, a putative tort claim against the Government is not "under" the FTCA simply by virtue of the plaintiff's attempt to invoke that statute. Rather, if it "bec[o]me[s] apparent ... that there was never any basis for relief" under that statute in the first place, *Okla. Gas*, 292 U.S. at 391—for example, because the jurisdictional provision does "not apply" to the claim—then that claim should not treated as one "under" § 1346(b). That is the best reading of § 2676, in view of its context and purpose.

3. Petitioners respond that this construction of "under" is foreclosed by the Court's decision in *Meyer*. Pet.Br.45-48. But *Meyer* is doubly irrelevant.

At the outset, *Meyer* construed a different word: whether a claim is "cognizable" under § 1346(b), *see* 510 U.S. at 476, not whether an action is "under" § 1346(b). While Petitioners suggest that these two terms are interchangeable, this Court "refrain[s] from concluding" that "differing language" in "two subsections" of one statute "has the same meaning in each." *Russello v. United States*, 464 U.S. 16, 23 (1983). And there is an obvious difference between the two words: "Cognizable" is language of *capability*. *See Meyer*, 510 U.S. at 476 (quoting definition of cognizable as "*capable* of being tried or examined before a designated tribunal" (emphasis added)).

Cognizability may thus turn exclusively on whether the claim "alleges" the "elements" of § 1346(b). *Id.* at 476-77. But "under" is language of *reality*, making it appropriate to consider whether the action turns out to *actually* implicate § 1346(b) jurisdiction.

Moreover, Petitioners' premise is false: *Meyer* did *not* hold that a claim exempted by § 2680 is still "cognizable" under § 1346(b). The claim in *Meyer* was not a § 2680 claim at all, and this Court never addressed § 2680 (beyond in an unrelated footnote). *See id.* at 474, 478 n.6. Rather, this Court held that a *Bivens* claim is not "cognizable" under § 1346(b) because it does not "alleg[e] the six elements" of that jurisdictional hook. *Id.* at 477. The Court thus had no occasion to speak to whether a claim that alleged those necessary elements but also fell within one of the § 2680 exceptions to which § 1346(b) does "not apply" would qualify as "cognizable" under § 1346(b) (much less whether its dismissal would constitute a judgment in an action "under" § 1346(b)).

Petitioners emphasize a footnote in *Meyer* that clarified that the proper inquiry is whether a claim is "cognizable" under § 1346(b), "not whether a claim is cognizable under the FTCA generally." *Id.* at 477 n.5 (emphasis omitted). But that banal observation, which corrected imprecise language in a prior case, *Loeffler*, 486 U.S. at 562, likewise does not suggest that claims exempted by § 2680 are cognizable under § 1346(b). Because of § 2680, *§ 1346(b) does not apply* to the exempted claims. Thus, it is perfectly fair to say that such a claim is not "cognizable" under § 1346(b)—and, *a fortiori*, that its dismissal is not a judgment "under" § 1346(b).

4. Straying further afield, Petitioners again cite *Smith*, this time to argue that its construction of § 2679(b) forecloses Respondent's reading of "action under [§]1346(b)" in § 2676. *See* Pet.Br.48-50.

The simple answer is that the two provisions are not remotely similar in text or purpose. Indeed, this Court in *Meyer* rejected the same Government-pressed analogy, calling *Smith* "unhelpful": After all, the Court "had no occasion in *Smith* to address the meaning of the term 'cognizable' because § 2679(b)(1) does not contain the term." *Meyer*, 510 U.S. at 478 n.6. Nor does § 2679(b)(1) contain the term "under"; *Smith* is thus equally "unhelpful" here. *Id.* Further, as already explained, the result in *Smith* was plainly dictated by other provisions in the Westfall Act, to which there is no analogue here. *Supra* Part I.B.1.

B. Jurisdictional Dismissals Are Not "Judgments" Under Section 2676.

Jurisdictional dismissals, such as under § 2680, do not trigger the judgment bar for a second reason as well. In light of the judgment bar's history and context, dismissals that lack claim-preclusive effect, like those for lack of jurisdiction, do not constitute "judgments" within the meaning of § 2676.

1. "Judgment" is a term with many definitions. Sometimes it means *any* determination by a court. Pet.Br.18-20. Sometimes it means *appealable* orders as in Federal Rule of Civil Procedure 54. Pet.Br.21. But there are narrower definitions, too. Specifically, when the FTCA was enacted, one accepted definition required, as a prerequisite to a "judgment," that the issuing court possess jurisdiction over the matters adjudicated. *See, e.g.*, *Black's Law Dictionary* (3d ed.

1933) (defining "judgment" as "[t]he final determination, *by a court of competent jurisdiction*, of the rights of the parties in an action or proceeding" (emphasis added)); 1 Abraham Clark Freeman, *A Treatise on the Law of Judgments* 4 (Edward W. Tuttle ed., 5th ed. 1925) (offering, as one definition of judgment, "the final consideration and determination *of a court of competent jurisdiction* upon the matters submitted to it" (emphasis added)).

If Congress intended the latter definition in § 2676, then the judgment bar is not triggered by a jurisdictional dismissal of a putative FTCA action, such as under § 2680. Such a dismissal is not a "judgment" adjudicating an FTCA claim, merely acknowledgement of the court's lack of authority to adjudicate the claim at all.

The question here is which definition Congress meant. Contrary to Petitioners' suggestion, courts at the time of the FTCA's enactment did not answer the question. Petitioners cite many decisions describing dismissals of FTCA claims—even jurisdictional ones, or dismissals under § 2680—as "judgments." Pet.Br. 20 & n.6. But those courts were not construing the judgment bar, or analyzing how Congress intended the term in that provision. Again, the question is not whether a jurisdictional dismissal *could be* described as a "judgment," but whether *Congress intended* the term "judgment" in § 2676 to include such orders.

Nor is the question resolved by the FTCA's use of the word "judgment" in other provisions. Petitioners point to § 412 of the original Act, which provided that final FTCA "judgments" "shall be subject to review by appeal" as specified there, and note that Congress presumably intended the same appellate review for

jurisdictional dismissals. Pet.Br.22. Even if so, *but see supra* p. 29, *other* uses of "judgment" in the Act point the opposite direction. For example, one section of the Act provides that the United States "shall not be liable for interest prior to judgment." 28 U.S.C. § 2674. In that context, Congress is referring to money judgments *against* the United States; there would never be potential liability for "interest" prior to a *dismissal*. Other FTCA provisions likewise use "judgment" to refer to an award against the United States. *See* 28 U.S.C. § 2672 (directing settlements to "be paid in a manner similar to judgments ... in like causes"); *id.* § 2678 (prohibiting attorneys' fees in excess of 25% of "any judgment rendered pursuant to section 1346(b)").[4]

In short, there are and always have been many meanings of "judgment." Which one Congress meant in § 2676 calls for analysis of that provision's context. *See Brown & Williamson*, 529 U.S. at 132 ("meaning

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[4] Indeed, the legislative history suggests that Congress understood the word "judgment" *in § 2676 itself* to refer to a money judgment against the Government. A Senate Report discussed how "[j]udgments" triggering the judgment bar "are to be paid." S. Rep. No. 77-1196, at 6 (1942) ("Judgments, which will bar further action upon the same claim against the negligent employee as well as the Government, are to be paid in the same manner as judgments rendered upon contract claims under the Tucker Act ...."). This Court, too, in one its earliest FTCA cases, said that the "one respect" in which the FTCA "touch[es] the liability of employees" is that § 2676 "makes the judgment *against the United States* 'a complete bar' to any action by the claimant against the employee." *Gilman*, 347 U.S. at 509 (emphasis added). That construction would also resolve this case against Petitioners.

... of certain words or phrases may only become evident when placed in context"); *cf. Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality op.) (cataloging cases ascribing different meaning to "identical language" in different statutes and "different provisions of the same statute").

2. The "context" of the judgment bar is *res judicata* and claim preclusion. Those background principles, against which § 2676 was enacted, confirm that no bar arises from mere jurisdictional dismissals, which carry no preclusive effect as a general rule. They are not, in other words, "judgments" within the meaning of § 2676.

a. As *Will* recognized, the closest "analogy to the judgment bar" is "claim preclusion, or *res judicata*," because the judgment bar "functions in much the same way" and was motivated by the same "concern"—namely, "avoiding duplicative litigation." 546 U.S. at 354. Confirming its intent to incorporate principles of claim preclusion into § 2676, Congress tellingly used the traditional *res judicata* language of a "bar" to suit. *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) ("[c]laim preclusion describes the rules formerly known as 'merger' and 'bar'").

To be sure, there would have been no need for the judgment bar if all it did was *apply* principles of claim preclusion to FTCA judgments. *Res judicata* already applies to federal judgments, as a matter of federal common law. *Id.* at 891. Section 2676 must therefore extend beyond traditional preclusion rules, at least as those rules were understood at the time of the FTCA's enactment. *Cf. Will*, 546 U.S. at 354 (recognizing that § 2676 is "arguably broader than traditional *res judicata*").

And it does—in a very clear way. Specifically, when Congress enacted the FTCA, a judgment in favor of a *federal employee* in a personal-capacity suit would, under then-prevailing ordinary preclusion rules, have barred a subsequent *respondeat superior* claim against *the Government*. *See Restatement of Judgments* § 99 (1942) ("valid judgment on the merits ... in favor of a person charged with the commission of a tort ... bars a subsequent action ... against another responsible for the conduct of such person"); *see also id.* § 96(1)(a) & cmts. b, d (same rule in master-servant scenario if servant sued first); *Roadway Express, Inc. v. McBroom*, 6 S.E.2d 460, 462 (Ga. Ct. App. 1939) ("a judgment on the merits in favor of the agent or servant ... is res judicata in favor of the principal or master"). There being no dispute on that score, there was no need for Congress to provide that a judgment in an action against an employee would bar a subsequent FTCA suit.

By contrast, if a plaintiff asserted *respondeat superior* liability against the employer *first*, the 1942 Restatement took the view that the plaintiff, if unsuccessful, *could* sue the employee—because of a lack of "mutuality" between defendants. *Restatement of Judgments* § 96(2) cmt. j ("[w]here an action is brought first against the one secondarily liable there is ordinarily no reason for an exception to the ordinary rules of mutuality and hence ... there is ordinarily no reason for binding the unsuccessful claimant"); *see also Myers' Admn'x v. Brown*, 61 S.W.2d 1052, 1053-54 (Ky. Ct. App. 1933) (answering no to question "whether a judgment in favor of a master or principal in a suit brought for the alleged negligence of the servant or agent ... inures to the

benefit of that servant or agent when later sued by the same plaintiff for the same negligence"); *Gilmer v. Porterfield*, 212 S.E.2d 842, 844 (Ga. 1975) ("Although a master has privity with his servant and can claim the benefit of an adjudication in favor of the servant, a servant is not in privity with the master so as to be able to claim the benefit of an adjudication in favor of the master."); *McVeigh v. McGurren*, 117 F.2d 672, 678 (7th Cir. 1940) ("a judgment against the principal is not binding or conclusive on an agent who is not a party").

Not all courts agreed. Some rejected the Restatement view, holding that a judgment in favor of a master "is a bar" to a subsequent suit against the servant. *E.g.*, *Wolf v. Kenyon*, 273 N.Y.S. 170, 173 (App. Div. 1934); *Jones v. Valisi*, 18 A.2d 179, 181 (Vt. 1941). The state of this mutuality law when the FTCA was enacted was thus unclear. Accordingly, Congress spoke to the question directly. Embracing the more relaxed approach to mutuality, Congress adopted a uniform federal rule that the judgment in an FTCA suit should be given preclusive effect in—*i.e.*, in the language of *res judicata*, should "bar"—a subsequent suit against the employee.

Congress and the Executive Branch understood that the purpose of the judgment bar was to ensure symmetry in *res judicata* treatment of tort claims against the Government and its employees. Testifying to Congress about the differences between the bill that became the FTCA and a prior version that lacked a judgment bar, Assistant Attorney General Shea explained that the judgment bar meant that a "[j]udgment in a tort action constitutes a bar to further action upon the same claim, *not only*

against the Government (as would have been true under [the prior version]) *but also against the delinquent employee.*" *1942 Hearing*, *supra*, at 27 (emphasis added); *see also* S. Rep. No. 77-1196, at 6 (1942) (judgments "will bar further action upon the same claim against the negligent employee as well as against the Government"). Notably, like the enacted FTCA, the referenced prior version of the bill contained no express provision barring further action upon the same claim against the Government. *See* H.R. 5373, 77th Cong. (1941). It was understood that such a bar arose from—and was defined by—the the common law of *res judicata*.[5]

Both modern scholarship and contemporaneous analysis agree that Congress enacted the judgment bar against the common-law backdrop of *res judicata*, to create a uniform symmetrical rule of preclusion for tort claims against the Government and its employees. *See* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 427-45 (2011); Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949) (bar "extends" the "common law rules of *res judicata*" to benefit employees). Indeed, only that reading of § 2676 explains its unidirectionality—its operation in favor of employees but not the Government itself.

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[5] The parallel wording of the FTCA provision protecting employees from lawsuits following acceptance of a *settlement* from the Government, *see* 28 U.S.C. § 2672; *supra* p. 15, is further evidence of Congress's focus on common-law principles of *res judicata* and mutuality.

b. Given that context, "judgment" as it is used in § 2676 cannot be understood as including jurisdictional dismissals. Those dismissals have no *res judicata* effect in the first place. Yet § 2676's object was to *extend* the claim-preclusive effect of FTCA judgments by relaxing the mutuality doctrine. It was not meant to *grant* preclusive effect to judgments that never would have had preclusive force *even in favor of the original defendant*.

It is black-letter law that dismissals for lack of jurisdiction do not carry claim-preclusive effect: not when the FTCA was enacted, and not today either. *Restatement of Judgments* § 49 & cmt. a (1942) (no claim-preclusive effect for dismissal "based on the lack of jurisdiction"); *Restatement (Second) of Judgments* § 20(1)(a) (1982) (no bar to "another action" when "judgment is one of dismissal for lack of jurisdiction"); *Hughes v. United States*, 71 U.S. 232, 237 (1866) (where "first suit was dismissed for ... want of jurisdiction," dismissal "will prove no bar to another suit"); *Swift v. McPherson*, 232 U.S. 51, 55-56 (1914). "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *Mayor v. Cooper*, 73 U.S. 247, 250 (1867).

In light of this background rule, a jurisdictional dismissal is not a "judgment" within the meaning of § 2676, as contemporaneous commentators agreed. *See* Note, *supra*, at 559 & n.170 (judgment bar "should not be interpreted as referring to any judgment by which the court denies its jurisdiction," which "cannot be res judicata of the issues involved in the action"). A jurisdictional dismissal would not even preclude suit against the *original defendant* based on the same events, so why would it preclude

suing a *non-party*? In other words, Petitioners' reading would, oddly, afford certain dismissals more potent preclusive effect in favor of non-parties than in favor of the United States. That cannot be right. *See also infra* Part III (detailing these and other absurdities of Petitioners' construction).

In short, if the judgment in an FTCA action would allow the Government to preempt a second suit, then it also allows federal employees to invoke *res judicata* principles if *they* are sued instead. But if the original dismissal would not even allow the Government to shut down a second suit, then such a dismissal does not count as a "judgment" that bars suit against the responsible employee either. Simply put, such a "judgment" has no claim-preclusive effect for § 2676 to extend to the benefit of the employee. It therefore does not constitute a "judgment" within the meaning of § 2676.

3. Looking to *res judicata* background rules to inform ambiguous statutes is a course this Court has taken before. The Anti-Injunction Act generally forbids federal-court injunctions against litigation in state courts. *See* 28 U.S.C. § 2283. But an exception, enacted just two years after the FTCA, allows such injunctions when necessary to "protect or effectuate" the "judgments" of a federal court. *Id.* Construing that exception, this Court has recognized that it is "founded in the well-recognized concepts of *res judicata* and collateral estoppel," and utilized those concepts to inform its "proper scope." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). The same goes for the FTCA judgment bar, which uses the same crucial, ambiguous word: "judgment."

Indeed, *Chick Kam Choo* shows why Petitioners' broad reading of the judgment bar is wrong. In that case, a federal court dismissed claims arising from events in Singapore, invoking *forum non conveniens* in favor of a suit in that country. *Id.* at 142-43. The plaintiffs, however, refiled in *state* court. *Id.* The question was whether the state-court suit could be enjoined to effectuate the federal "judgment" of dismissal. *Id.* at 144-45. Consistent with preclusion principles, this Court said no: The federal court had not "resolve[d] the merits" of the claims, and state courts may "consider themselves an appropriate forum," even if federal courts did not. *Id.* at 148.

Similarly, a jurisdictional dismissal of an FTCA action against the United States is not a "judgment" that should bar a claim against a federal employee. Like a dismissal based on *forum non conveniens*, it does not resolve the merits of the underlying tort claim, and the employee may be a viable defendant even if the Government is not.

4. Petitioners agree that § 2680 dismissals are jurisdictional, but nonetheless claim that they carry *res judicata* effect and should trigger the judgment bar. Their arguments are wrong.

a. Petitioners claim that, whatever the general rule for jurisdictional dismissals, § 2680 dismissals reflect substantive policy judgments as to the scope of liability and thus constitute decisions "on the merits" carrying claim-preclusive effect. Pet.Br.33-38. This argument is doubly flawed.

At the outset, Petitioners misunderstand the meaning of "on the merits." As this Court has noted, that phrase was historically used as a shorthand

description of the type of judgment "entitled to claim-preclusive effect." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502-03 (2001). But "over the years," the phrase's meaning changed, and it is now "no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect." *Id.* "That is why the Restatement of Judgments has abandoned the use of the term ['on the merits']—'because of its possibly misleading connotations.'" *Id.* at 503 (quoting *Restatement (Second) of Judgments* § 19, cmt. a). The dichotomy, rather, is between judgments entitled to claim-preclusive effect and those that are not. *See id.*[6]

Accordingly, whether § 2680 dismissals can be characterized as "substantive" in some sense—such as in unrelated contexts like retroactivity doctrine, *see* Pet.Br.39—is irrelevant. Either way, they are dismissals *for lack of jurisdiction*, because the court simply has no power to adjudicate the claim. *Accord* Pet.Br.4. Under *res judicata* principles, they are therefore *not* entitled to claim-preclusive effect. *See Semtek*, 531 U.S. at 502. And that is why they do not trigger the judgment bar, which merely extends to employees the existing *res judicata* effects of FTCA judgments.

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[6] Many courts, of course, continue to refer to a judgment "on the merits" as a prerequisite for claim preclusion, when they mean, more precisely—albeit less descriptively—that there must be a type of judgment entitled to claim-preclusive effect. *Semtek*, 531 U.S. at 502. That is surely how the Sixth Circuit intended the phrase, when it explained that § 2676 is triggered only by a judgment "on the merits," Pet.App.8a, as opposed to one for "lack of subject-matter jurisdiction," Pet.App.6a.

Anyway, even if "on the merits" were the proper standard, a § 2680 dismissal is not "on the merits" in the relevant sense of "pass[ing] upon the substantive merits of [the] claim." *Semtek*, 531 U.S. at 502. Yes, § 2680 reflects policy judgments about when the United States should waive its sovereign immunity. Pet.Br.34. But, at the same time, it does not reflect any judgment about the substantive tort claim under state law. Indeed, the § 2680 exceptions apply *despite* the existence of a viable state-law tort claim. Section 2680 relates to the availability of a *remedy against the United States*, but says nothing about the underlying substantive *right* under state law.

In that sense, a § 2680 dismissal is analogous to a statute-of-limitations dismissal, which historically "merely bars the remedy and does not extinguish the substantive right"—and therefore traditionally lacks claim-preclusive effect. *Semtek*, 531 U.S. at 504. So just as a plaintiff whose first suit was time-barred could still sue in another jurisdiction, *id.*, a plaintiff who has no remedy *against the Government* under § 2680 could still sue *the responsible employee* under state tort law or otherwise.[7]

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[7] For this reason, then-Judge Breyer's opinion in *Rose v. Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), hurts rather than helps Petitioners. That court acknowledged that jurisdictional dismissals lack claim-preclusive effect, but held that the statute of limitations applied by the state court in that case was not truly jurisdictional. *See id.* at 79-80. Among other things, that particular limitations bar—unlike most—*did* extinguish the "right," not merely the "remedy." *Id.* at 80-81. But § 2680 speaks only to the *remedy* against the United States.

b. Petitioners also insist that, while jurisdictional dismissals generally lack *res judicata* effect, there is a different rule for such dismissals if based on sovereign immunity. *See* Pet.Br.38 & n.18.

Again, Petitioners conflate two distinct concepts. *State* sovereign immunity, as a matter of *state law*, may well be an affirmative defense that does not deprive *state* courts of jurisdiction. Thus, for example, the first case Petitioners cite on this point, *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 & n.3 (5th Cir. 1984), relies on a Texas case holding "sovereign immunity" to be an "affirmative defense," *Herring v. Tex. Dep't of Corrs.*, 500 S.W.2d 718, 719-20 (Tex. Civ. App. 1973). Similarly, in *Kutzik v. Young*, 730 F.2d 149, 151 (4th Cir. 1984), the court relied on Maryland's treatment of state sovereign immunity as a "legal defense," not a "jurisdictional" flaw, *Annapolis Urban Renewal Auth. v. Interlink, Inc.*, 405 A.2d 313, 318 (Md. Ct. Spec. App. 1979). *Accord Beaver v. Bridwell*, 598 F Supp. 90, 93 (D. Md. 1984).

The sovereign immunity of the *United States*, however, as a matter of *federal law*, is decidedly a jurisdictional limit on the *federal* courts. *Meyer*, 510 U.S. at 475. Petitioners do not claim otherwise. A dismissal on that basis, such as pursuant to a § 2680 exception, thus has "no *res judicata* effect." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

c. Finally, Petitioners observe that even jurisdictional dismissals have *issue-preclusive* effect as to the findings underlying the dismissal. Pet.Br. 39-40. That is true, but irrelevant.

Issue preclusion, traditionally called collateral estoppel, "foreclos[es] relitigation of a matter that has been litigated and decided." *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 77 n.1 (1984). That includes jurisdictional determinations. But the relevant doctrine here is *claim preclusion*, usually called *res judicata*, which "foreclos[es] litigation of a matter that never has been litigated." *Id.* After all, an employee invoking the judgment bar to shut down a *Bivens* suit does not claim the latter is barred by any factual or legal finding that triggered dismissal of the FTCA action under § 2680. Petititioners do not assert that Respondent's *Bivens* suit is somehow foreclosed because they exercised a "discretionary function." Pet.App.53a. Rather, they argue that the *Bivens* claim arises from the same events as the FTCA action did, and so dismissal of the latter bars the former. That is an effort to invoke the judgment bar as an analogy to claim preclusion. But because jurisdictional dismissals lack claim-preclusive effect, § 2676 cannot extend that effect to favor employees.

To be clear: Section 2676's "bar" filled a hole in the law of *claim preclusion*, *i.e.*, "merger and bar," so employees could invoke the claim-preclusive force of FTCA dismissals. But jurisdictional dismissals carry no claim-preclusive effect in the first place; such dismissals should not be regarded as "judgments" within that provision's meaning. Petitioners' retort that jurisdictional dismissals carry some limited *issue-preclusive* effect is therefore beside the point.

In short, Petitioners *do not* deny that § 2680 is jurisdictional, and *cannot deny* that jurisdictional dismissals are not *res judicata*. A § 2680 dismissal is thus not a "judgment" triggering the § 2676 "bar."

C. Section 2680 Dismissals Do Not Trigger The Judgment Bar Since They Rest On Defenses Personal To The Government.

Because all parties agree that § 2680 sets forth jurisdictional exceptions, the Court should so assume in resolving this case. But even if a § 2680 dismissal were not jurisdictional, it still would not be a "judgment" triggering the § 2676 "bar." Section 2680 reflects a decision by the United States not to accept *respondeat superior* liability for certain types of claims. These are thus defenses personal to the Government, with no application to suits against employees. Under the *res judicata* principles reflected by the judgment bar, dismissals on such personal defenses cannot be invoked to bar suits against non-parties, even when mutuality is *not* a barrier. So just as dismissal of a claim against an employee based on a defense unique to him would not "bar" suit against his employer, dismissal of an FTCA suit under § 2680 does not trigger the judgment "bar" to preclude a *Bivens* suit.

The 1942 Restatement explained that for a "judgment on the merits" in favor of a servant to "bar a subsequent action" against "another responsible for the conduct of such person" (*e.g.*, his employer), that judgment could "not [be] based on a personal defense." *Restatement of Judgments* § 99; *see also id.* § 96. That is, to have preclusive effect, the judgment could not rest on a defense only available to the servant, such as a "personal immunity." *Id.* § 96 cmt. g. States that did not follow the Restatement's asymmetrical preclusion rule likewise held that judgments in favor of a *master* based "on some personal defense" would not bar subsequent suits

against the *servant*. *E.g.*, *Griffin v. Bozeman*, 173 So. 857, 859-60 (Ala. 1937). Thus, if an employer were exonerated for his employee's acts "in consequence of a finding that the employee acted beyond the scope of his employment, the judgment would not merit conclusiveness" in a suit against the employee. *Lober v. Moore*, 417 F.2d 714, 718 n.31 (D.C. Cir. 1969); *Tighe v. Skillings*, 9 N.E.2d 532, 534 (Mass. 1937).[8] The same rule governs today: Judgments resting on personal defenses do not trigger *res judicata* in the principal-agent context. *See Restatement (Second) of Judgments* § 51(1)(b) & cmt. c (1982) (no preclusion in second action if "judgment in the first action was based on a defense that was personal to the defendant"); *Burdette v. Carrier Corp.*, 71 Cal. Rptr. 3d 185, 197-98 (Ct. App. 2008).

The "bar" created by § 2676 incorporates that same rule. It extends to employees the preclusive force of FTCA judgments, rejecting the asymmetrical Restatement rule. But it does not wipe away the other conditions for *res judicata*. Thus, just as the United States cannot avail itself of a judgment in favor of an employee on a personal defense, employees cannot avail themselves of judgments in favor of the Government on its personal defenses. And the § 2680 exceptions are quintessentially

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[8] *See also Whitehurst v. Elks*, 192 S.E. 850, 851 (N.C. 1937) ("Where the relation between two parties is analogous to that of principal and agent, ... the rule is that a judgment in favor of either, in an action brought by a third party, *rendered upon a ground equally applicable to both*, should be accepted as conclusive against plaintiff's right of action against the other." (emphasis added)).

personal. Like an assertion that an employee acted outside the scope of employment, these exceptions can only be "taken advantage of" by the Government. *Restatement of Judgments* § 96 cmt. g. Because the exceptions "would not apply to an action against [an employee]," dismissal on these grounds "does not bar [a] subsequent action against" the employee. *Id.*

In sum, in extending the *res judicata* effect of FTCA judgments to preclude subsequent litigation against federal employees, the judgment bar did not override the background common-law rule that personal-defense dismissals carry no preclusive effect. There is no reason to believe that Congress sought, in this respect, to afford *greater* protection to federal employees than to the United States itself.

* * *

When a court dismisses a putative FTCA action under § 2680, that is neither a dismissal of an action "under" the FTCA's jurisdictional hook nor a "judgment" that acts as a "bar" under *res judicata* principles. Such a dismissal thus does not have the counterintuitive consequence of barring the plaintiff from invoking the only remedy actually available.

III. PETITIONERS' EXPANSIVE READING OF THE JUDGMENT BAR WOULD LEAD TO ABSURD RESULTS.

Petitioners urge this Court to hold that § 2676 is triggered by *any* dismissal, on *any* ground, of *any* tort claim against the Government. That unyielding position—which no Circuit has embraced since the FTCA's 1946 enactment—has to be wrong. It would cause a host of absurdities, *undermining* Congress's objectives in enacting the landmark statute.

First, Petitioners' wooden reading leads to absurd results. They claim that the "plain meaning" of § 2676 does not limit its scope, and so any "entry of a 'judgment'" in a suit invoking the FTCA precludes subsequent *Bivens* actions. Pet.Br.12, 17. On that construction, if a plaintiff erroneously filed his FTCA suit in the *Southern* District of Ohio instead of the *Northern* District, leading to dismissal without prejudice for improper venue, he could refile that suit—but would be precluded from filing a *Bivens* action. Or, if the FTCA action were dismissed because the employee was not acting within the scope of employment—a holding that means the employee himself ought to be "personally answerable," *Gutierrez de Martinez*, 515 U.S. at 423—a suit against the employee would, paradoxically, be *precluded*. That makes no sense, as noted by both early and modern commentators. *See* Reginald Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167, 176 (1952) (judgment bar "obviously" does not apply there); Jayson & Longstreth, *supra*, § 16.13 (noting how Petitioners' reading "produc[es] absurd results").

Second, the practical consequence of that broad reading is that injured parties would have every incentive to sue the employee *first*—to avoid the risk of a jurisdictional FTCA dismissal extinguishing the *Bivens* action. Section 2676, after all, precludes only the *latter* based on the *former*, not vice versa. But one of the Act's principal objects was to offer relief from the deep-pocketed Government to *discourage* personal-capacity suits, which "attack ... the morale of the services." *Gilman*, 347 U.S. at 511 n.2. Petitioners' construction would do the *opposite*.

Finally, if injured parties did *not* sue the employee first, Petitioners' reading would deprive them of any opportunity to remedy their injuries—even if they are otherwise entitled to relief from *someone* as a matter of both fact and law. It may well be that § 2680 bars relief *from the Government*. But that hardly implies that the employee has complied with the Constitution. To the contrary, it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980). That is why Congress expressly exempted *Bivens* claims from the Westfall Act's exclusive-remedy provision. Yet, on Petitioners' view, a judicial decision finding the FTCA *inapplicable*—even if § 2680's applicability presented a close legal question, and the plaintiff's claim was colorable—would be a death knell for the "parallel" *Bivens* remedy. Nothing in the FTCA's purposes or history supports that strange result. *See id.* at 18-19 (*Bivens* suit precluded only if "Congress has provided an alternative remedy which it explicitly declared to be a substitute"). The Act was not meant to minimize litigation at all costs, but to give plaintiffs a choice of two remedies. If one of those remedies is categorically unavailable, that is *all the more reason* to permit the other.

CONCLUSION

This Court should affirm the judgment below.

FEBRUARY 2016

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No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

No. 15-109

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

When Congress enacted the Federal Tort Claims Act (FTCA), it struck a balance, accepting liability for certain tort claims while protecting the government from burdensome and duplicative litigation. Applying the FTCA judgment bar to judgments of dismissal under the exceptions to liability set forth in 28 U.S.C. 2680 maintains that balance and comports with the plain meaning of the statutory term "judgment." 28 U.S.C. 2676. Respondent's contrary arguments lack merit.

A. Section 2680's Introductory Clause Does Not Exempt The Identified Claims From Every Other FTCA Provision

Respondent's principal argument (Br. 12-30) is that Section 2680's introductory clause precludes application of the judgment bar to this case. That clause states that "[t]he provisions of this chapter [*i.e.*, Chapter 171 of Title 28 of the United States Code] and

section 1346(b) of this title shall not apply to" the categories of claims identified in Section 2680(a)-(n). 28 U.S.C. 2680. If read literally, that language would mean that no FTCA provision applies to any claim falling within the exceptions set forth in Section 2680. The parties agree that the literal reading conflicts with this Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1991), which held that Section 2679(b) does apply to Section 2680 claims. *Id.* at 161-162, 165-167; Resp. Br. 18-21; Pet. Br. 50-51. Neither party urges the Court to adopt that literal reading here.

As we showed in our opening brief, the proper reading of Section 2680—and the only reading consistent with *Smith*—is that the introductory clause exempts the categories of tort claims set forth in Section 2680 from the FTCA's waiver of sovereign immunity and imposes substantive restrictions on the tort liability of the United States. See Pet. Br. 3-5, 33-35, 52-53. But Section 2680 does not exempt those claims from other FTCA provisions such as the judgment bar. Applying the bar to Section 2680 claims is consistent with how courts have treated Section 2679(a) and (b), the FTCA's other limits on remedies that plaintiffs can pursue outside the FTCA. See *Smith*, 499 U.S. at 161-162, 165-167. It also tracks the judgment bar's core purpose of alleviating the strain that multiple lawsuits on the same facts would pose to government resources and employee morale. See Pet. Br. 23-28.[1] And it is consistent with the decisions of

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[1] Although respondent concedes that the judgment bar's "core concern" is to avoid "duplicative litigation," he asserts that this concern is not implicated unless "duplicative *remedies* exist." Br. 15 (emphasis added). But litigation over Section 2680 can entail months—and even years—of burdensome discovery, trial, and

the Ninth Circuit and the Seventh Circuit, each of which has applied the judgment bar in these circumstances. See Pet. 22-24.[2]

Respondent proposes a different approach. He argues (Br. 18-21) that Section 2680's introductory clause exempts Section 2680 claims from any provision that appeared in the original FTCA, but *not* from any subsequent amendments to the FTCA. He asserts (*ibid.*) that this construction is compelled by Section 421 of the original FTCA—the predecessor to Section 2680—which excluded the enumerated claims from the "provisions of this *title*," *i.e.*, from Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 845 (emphasis added). No court has adopted this interpretation of Section 2680, and this Court should not be the first.

1. Congress did not intend Section 2680's introductory cross-reference to encompass only those provisions contained in the original FTCA. See Resp. Br. 18-21. It is true that Section 421's introductory clause originally stated that "[t]he provisions of this *title*"—*i.e.*, Title IV of the Legislative Reorganization Act—would not apply to the identified claims. 60 Stat. 845 (emphasis added). But that formulation does not mean that if Congress later added new provisions to

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appeal. See Pet. Br. 23-28. As a practical matter, allowing an unsuccessful FTCA plaintiff to turn around and sue the individual employee would require the government to defend against essentially the same suit a second time. Respondent's interpretation would undermine the judgment bar's primary purpose.

[2] Our interpretation would also permit the United States to invoke judicial and legislative immunity in any FTCA case alleging torts committed by judges or legislators, as Congress plainly intended in 28 U.S.C. 2674. But see Resp. Br. 12 (denying that Section 2674 applies to Section 2680 cases).

Title IV, Section 421's cross-reference would not likewise encompass those provisions as well. To the contrary, when Congress includes a cross-reference in a statute, it understands that amendments to the referenced provision will affect the operation of the referencing provision.[3]

Other FTCA provisions confirm that Congress did not understand Section 421's reference to "this title" to exclude any subsequent amendments to the FTCA. See § 402, 60 Stat. 842-843 (stating that definitions apply to terms "[a]s used in this title"); § 403(a) and (b), 60 Stat. 843 (addressing agency authority to settle claims "[s]ubject to the limitations of this title"); § 410(a), 60 Stat. 843-844 (stating that jurisdiction over FTCA claims and liability of United States are "[s]ubject to the provisions of this title"); § 420, 60 Stat. 845 (establishing statute of limitations for claims "under this title"). Congress would have understood those cross-references to encompass subsequent amendments to the FTCA. The same is true with respect to Section 2680's cross-reference.

In any event, Congress changed the original cross-reference in 1948, when it recodified the original FTCA and promulgated Section 2680 as positive law. See Act of June 25, 1948 (1948 Act), ch. 646, Tit. VI, Ch. 171, § 2680, 62 Stat. 984. In doing so, Congress

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[3] Imagine a criminal statute in which Section A identifies three prohibited acts, and Section B declares that "Any conviction for violating Section A shall be punished by 30 days of imprisonment." If Congress later adds a fourth prohibited act to Section A, there is no doubt that Section B's 30-day penalty would apply to convictions for violating the new prohibition. Cf. 18 U.S.C. 1961, 1962, 1963 (using cross-references to define, prohibit, and punish "racketeering" under the Racketeer Influenced and Corrupt Organizations Act).

replaced Section 421's cross-reference to "[t]he provisions of this title [*i.e.*, Title IV]" with a cross-reference to "[t]he provisions of this chapter and section 1346(b)." *Ibid.*; see 28 U.S.C. 2680. The parties agree that the recodification made no substantive change. See Resp. Br. 20-21. But if that is so, then the deletion of any express reference to Title IV confirms that Congress did not understand even the *original* cross-reference to encompass only those provisions appearing in the original Title IV (but not any subsequent amendments).[4]

Respondent's interpretation of Section 2680's cross-reference is quite difficult to implement in practice. To determine whether a particular FTCA provision applies to a Section 2680 claim, courts and individuals must disregard the United States Code, determine whether the provision appeared in Title IV, and then decide whether or how it might apply to the case at hand. See Resp. Br. 19-21.

Respondent's own brief illustrates the potential for confusion. For example, respondent declares (Br. 12) that, under his theory, 28 U.S.C. 2675's administrative-exhaustion requirement "does 'not apply'" to Section 2680 claims. But the exhaustion requirement was not part of Title IV: Congress added it to the FTCA in 1966. See Act of July 18, 1966, Pub.

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[4] Respondent insists that the original and recodified versions of the cross-references are incompatible, and that courts should ignore the recodified version and instead apply the original. Br. 19-21 (arguing that the Statutes at Large trump the United States Code when the provisions are "inconsisten[t]") (citation omitted). The better approach is to read the original and recodified versions in harmony with one another—and to recognize that neither limits the cross-reference only to provisions that appeared in the original FTCA.

L. No. 89-506, §§ 2(a), 7, 80 Stat. 306-307. Under respondent's own theory, then, the introductory clause to Section 2680 does not exempt the later-enacted Section 2675, and thus that requirement *does* apply to Section 2680 claims. Respondent's (entirely understandable) error illustrates that his theory is impractical.

2. Respondent is also wrong to assume that the original version of Section 2680's introductory clause exempted the identified claims from *all* other FTCA provisions. As our opening brief explained (Br. 51-53), Congress intended Section 2680 claims to be subject to a variety of other original FTCA provisions, including those that (1) applied the Federal Rules of Civil Procedure to FTCA cases; (2) authorized appellate review of district court judgments; (3) defined key statutory terms; and (4) made the FTCA the exclusive remedy for claims that might otherwise have been brought directly against federal agencies. See Legislative Reorganization Act, §§ 402, 411, 412, 423, 60 Stat. 842-846.

a. Respondent does not deny that the claims identified in Section 421 (now Section 2680) were subjected to the Federal Rules of Civil Procedure by Section 411 of the original FTCA. See Resp. Br. 28-29. That refutes his assertion that Section 421's introductory language must be read literally to exempt the identified claims from all other original FTCA provisions.

b. Respondent concedes (Br. 29) that under his theory, Section 412 of the original FTCA—which authorized appellate review of final FTCA judgments—would not apply to the claims identified in Section 421. But Congress plainly intended to allow appeals of Section 421 judgments, and this Court

adjudicated an appeal of such a judgment that was initiated pursuant to Section 412. See *United States* v. *Spelar*, 338 U.S. 217 (1949).

Respondent seems to assume (Br. 29), that Section 412's function was merely to authorize FTCA appeals to the Court of Claims. In fact, that provision *also* provided the legal basis for review in the courts of appeals. See Legislative Reorganization Act § 412(a)(1) and (b), 60 Stat. 844, 845. In any event, Congress plainly understood Section 412 to make Section 421 claims appealable to the Court of Claims in appropriate circumstances. In the 1948 recodification, Congress stated that the Court of Claims' appellate jurisdiction extended to "final judgments in the district courts in civil actions *based on tort claims brought under section 1346(b)*." 1948 Act § 1504, 62 Stat. 942 (emphasis added). The italicized phrase unambiguously encompasses Section 421 appeals.

c. Congress also understood that the original FTCA's definitional provision—Section 402—would apply to Section 421 cases. Two of the defined terms ("Federal agency" and "Employee of the Government") appear in Section 421(a) and (e). This Court relied on Section 402(b)'s definition of the latter term when interpreting Section 2680(a)'s discretionary-function exception in *Dalehite* v. *United States*, 346 U.S. 15, 33 n.28 (1953).

Respondent denies (Br. 28) that applying the definitions to Section 2680 is inconsistent with his theory. He asserts that whereas Section 2680 "directs that the [FTCA's] provisions 'shall not apply' to certain 'claim[s],'" the definitions "are definitions of *statutory terms*," and accordingly "do not apply or attach to 'claims' at all, so there is nothing for [Section] 2680 to

render inapplicable." *Ibid.* It is not clear precisely what respondent means by this statement, because virtually any case in which the definitional provision is used to interpret Section 2680 *will* involve a Section 2680 "claim." See, *e.g.*, *Dalehite*, 346 U.S. at 33 n.28. Respondent's concession that Section 402 governs the proper interpretation of Section 2680 is incompatible with his argument that none of the FTCA's original provisions apply to Section 2680 claims.

d. Our opening brief cited testimony by Assistant Attorney General Francis Shea establishing that Congress understood Section 423 of the original FTCA—the precursor to 28 U.S.C. 2679(a)—to apply to claims falling under "the exceptions of the act [including the Section 2680 exceptions]." Pet. Br. 52 (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942) (*1942 Hearings*)). Section 2679(a) makes the FTCA the exclusive remedy for tort claims against the government, even against agencies that may otherwise "sue and be sued" in their own name. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) (citation omitted). Respondent does not deny that Shea's statement is inconsistent with respondent's theory that Section 2679(a)—like all other provisions of the original FTCA—does not apply to Section 2680 claims.[5]

Respondent nonetheless argues (Br. 24) that "agencies with sue-and-be-sued clauses *can indeed* be sued on the claims listed in [Section] 2680," and he

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[5] Although the Court declined to rely on other aspects of Shea's remarks in *Meyer*, 510 U.S. at 478-479, it did not question Shea's statement indicating that Section 2679(a) would apply to Section 2680 claims. See Pet. Br. 52.

categorically asserts that "[Section] 2679(a) "does *not* apply—and was *always understood* not to apply—to claims exempted by [Section] 2680." That is simply incorrect. For decades, the courts of appeals have regularly applied Section 2679(a) to bar plaintiffs from directly suing agencies with respect to tort claims encompassed by Section 2680. See, *e.g.*, *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Me. Corp.* v. *United States Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 295-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland E.F.C.U.* v. *FDIC*, 506 F.2d 1213, 1215-1216 (9th Cir. 1974); *Edelman* v. *FHA*, 382 F.2d 594, 596 (2d Cir. 1967); see also Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 549-551 & n.111 (1947). Respondent ignores these decisions, which directly contradict his interpretation of Section 2680's introductory language.

Respondent is correct (Br. 24-26) that, notwithstanding Section 2679(a)'s sue-and-be-sued provision, courts have allowed tort plaintiffs to sue the Tennessee Valley Authority, the Panama Canal Company, and certain federal banks on claims exempted from the FTCA by Section 2680(*l*), (m), and (n). But none of respondent's eight cited decisions discusses Section 2680's introductory clause exempting the identified claims from "the provisions of this chapter" or identi-

fies that clause as the basis of its holding. They accordingly do not support respondent's theory.[6]

In short, this Court in *Smith* correctly recognized that Section 2679(b) *does* apply to Section 2680 claims, 499 U.S. at 161-162, 165-167, thereby refuting any argument that the introductory clause exempts the enumerated claims from all of the FTCA's other provisions. Respondent's interpretation of Section 2680's introductory clause simply cannot be squared with *Smith*.[7]

B. Respondent's FTCA Action Was "An Action Under Section 1346(b)"

Respondent also argues (Br. 31-37) that the dismissal of his FTCA suit does not trigger the judgment bar because the suit was not "an action under section 1346(b)" 28 U.S.C. 2676. In his view, the phrase "an action under section 1346(b)" refers only to actions that "actually *fall[] within [Section 1346(b)'s] jurisdictional scope*." Br. 33 (citation omitted). Respondent is mistaken.

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[6] Respondent's decisions reflect legislative history indicating that Congress's specific purpose was to permit suits directly against the covered entities. See, *e.g.*, H.R. Rep. No. 830, 81st Cong., 1st Sess. 4-5 (1949); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); see also *Sterrett* v. *Milk River Prod. Credit Ass'n*, 647 F. Supp. 299, 301-302 n.6 (D. Mont. 1986). Section 2680(*l*), (m), and (n) are different from the other categories of claims set forth in Section 2680(a)-(k), as to which Congress *did* seek to immunize federal agencies.

[7] Respondent is wrong to suggest (Br. 21-22) that *Smith* turned on this Court's resolution of a perceived conflict between Section 2680's introductory clause and Section 2679(d)(4)'s language recognizing that Section 2679(b) would apply to Section 2680 claims. He offers no evidence that either Congress or this Court saw any inconsistency between those provisions.

1. Respondent's argument is foreclosed by *Meyer*. That case held (1) that Section 2679(a)'s reference to "claim * * * cognizable under section 1346(b)" encompasses all tort claims that are "actionable under" that provision, and (2) that to be "actionable," the claim need only allege the six jurisdictional elements set forth in Section 1346(b). 510 U.S. at 477; see Pet. Br. 45-48. An FTCA suit can therefore be actionable under Section 1346(b)—and thus an "action under section 1346(b)" for purposes of the judgment bar—even if it is ultimately dismissed under Section 2680. Pet. Br. 46-47.

Respondent seeks to distinguish *Meyer* on the ground that Section 2679(a) refers to actions "*cognizable* under section 1346(b)" instead of simply actions "under section 1346(b)," as in the judgment bar, 28 U.S.C. 2676. Br. 35-37 (emphasis added). But the word "cognizable" if anything makes Section 2679(a)'s phrase *narrower* than the judgment bar. In any event, *Meyer* equated the phrase "cognizable under section 1346(b)" with "actionable under § 1346(b)," 510 U.S. at 477, and there is no basis for concluding that an "action under section 1346(b)" means something other than a claim that is "actionable under § 1346(b)."

Respondent points out (Br. 36) that *Meyer* did not expressly state that a claim that is exempted by Section 2680 is still "cognizable" under Section 1346(b). But that is the necessary consequence of *Meyer's* statements that (1) a claim is "cognizable under section 1346(b)" so long as it alleges the six elements set forth in that provision, and (2) "[t]he question is not whether a claim is cognizable under the FTCA generally * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. 510 U.S. at 477 & n.5.

That language recognizes the possibility that an FTCA claim might *not* be cognizable under other FTCA provisions—such as Section 2680—even though it *is* cognizable under Section 1346(b).[8]

2. Respondent's construction of "action under section 1346(b)" is also inconsistent with Congress's use of virtually identical language elsewhere in the FTCA. Most significantly, Section 2679(d) sets forth the procedures under which the United States must be substituted as the defendant in a tort action filed against a federal employee for conduct within the scope of his employment. 28 U.S.C. 2679(d). In three separate provisions, Section 2679(d) indicates that when such substitution is proper, the case "shall be deemed" to be "an *action* against the United States *under the provisions of this title* [*i.e.*, under Title 28 of the United States Code]." 28 U.S.C. 2679(d)(1)-(3) (emphasis added) Section 2679(d)(4) then states that any such case "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and *shall be subject to the limitations and exceptions* applicable to those actions." 28 U.S.C. 2697(d)(4) (emphasis added).

Section 2679(d) thus makes clear Congress's understanding that an action "under" the FTCA is one that *invokes* the FTCA, regardless of whether or not

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[8] Respondent also asserts (Br. 36) that his FTCA suit was not "cognizable" under Section 1346(b) because Section 2680's introductory clause renders Section 1346(b)'s jurisdictional grant inoperative with respect to Section 2680's exceptions. This Court rejected a similar argument in *Smith*, where it held that Section 2679(b)(1)'s phrase "[t]he remedy * * * provided by sections 1346(b) and 2672" encompasses Section 2680 claims, even though Section 2680 forecloses any means of recovery. 499 U.S. at 166; see Pet. Br. 48-50.

the action is ultimately foreclosed by Section 2680. That is inconsistent with respondent's claim that the judgment bar's phrase "action under section 1346(b)" refers only to actions that *properly* invoke Section 1346(b) and are *not* subject to Section 2680.

Along similar lines, Section 2674 of the FTCA states that, "[w]ith respect to any *claim under this chapter* [*i.e.*, Chapter 171 of Title 28 of the U.S. Code, 28 U.S.C. 2671-2680]," the United States may assert a variety of legal defenses—including "judicial or legislative immunity"—that either it or the alleged tortfeasor could ordinarily assert in litigation. 28 U.S.C. 2674 (emphasis added). That provision only makes sense if a "claim under this chapter" covers any claim in which the plaintiff invokes the FTCA as the basis of his claimed relief, regardless of whether defense ultimately forecloses relief on that claim. Respondent ignores Sections 2679(d) and 2674, both of which fatally undermine his theory.

C. A Section 2680 Dismissal Is A "Judgment"

Respondent's third main argument (Br. 37-50) is that the judgment bar's unadorned reference to "judgment" excludes judgments dismissing actions under Section 2680. In respondent's view, the term judgment encompasses only the subset of judgments entitled to preclusive effect under *res judicata*. He is wrong about that, but in any event Section 2680 dismissals do have preclusive effect and therefore satisfy his test.

1. Respondent does not seriously dispute that when Congress enacted the FTCA in 1946, a Section 2680 dismissal would have qualified as a "judgment" as that term was used in (1) standard legal dictionaries; (2) the Federal Rules of Civil Procedure; (3) judi-

cial opinions; (4) the Restatement's discussion of *res judicata*; and (5) other provisions of the FTCA. See Resp. Br. 37-40; Pet. Br. 18-22, 29-32. Respondent has not identified a single pre-existing definition of "judgment"—in *any* context—that would exclude a Section 2680 judgment of dismissal.[9] And there is no indication that Congress meant to exclude Section 2680 dismissals from the meaning of "judgment" when it drafted the judgment bar.

2. In any event, a Section 2680 dismissal qualifies as a "judgment" under respondent's own view that the bar covers any judgment with "preclusive effect" in a subsequent action against the United States under common-law *res judicata*. Br. in Opp. 33; see Resp. Br. 40, 42-43, 45, 50; Pet. Br. 33-41.

a. Respondent asserts (Br. 44-47) that a jurisdictional dismissal can *never* have claim-preclusive effect. But that general rule does not apply in the unusual circumstance when a jurisdictional determination also necessarily passes on the substantive merits of the claim. See Pet. Br. 36-40. In cases involving such dual-purpose dismissals, the policies underlying *res judicata*—avoiding duplicative litigation, conserving judicial resources, and encouraging reliance on prior decisions—all support granting the dismissal preclusive effect. *Ibid.* Justice Breyer recognized as much in *Rose* v. *Town of Harwich*, 778 F.2d 77 (1st Cir.

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[9] The lone definition respondent cites (Br. 37-38) from *Black's Law Dictionary* (3d ed. 1933) does not count, because "a federal court always has jurisdiction to determine its own jurisdiction," *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). And Congress's use of the term "judgment" in other FTCA provisions and the legislative history (see Resp. Br. 39 & n.4) is fully consistent with the ordinary meaning of that term.

1985), cert. denied, 476 U.S. 1159 (1986), which held that a dismissal for lack of jurisdiction under the Massachusetts statute of limitations was nonetheless "on the merits" and capable of triggering claim preclusion. *Id.* at 79-80; Pet. Br. 36-37, 39.

Respondent does not explain why it makes sense to deny claim-preclusive effect to jurisdictional dismissals that also necessarily pass on the substantive merits of a claim. He does challenge (Br. 48 n.7) our reliance on *Rose*, asserting that the First Circuit "held that the statute of limitations applied by the state court in that case was not truly jurisdictional." That is not correct: *Rose* held that even though the state-court decision *was* jurisdictional, it was nonetheless *also* entitled to claim-preclusive effect because it was also "on the merits" and extinguished the plaintiff's "underlying substantive 'right'" to recover. 778 F.2d at 79-81. Crucially, the court explained that the "jurisdictional" exception to *res judicata* applies only to "technical" or "procedural" defects that may be "cured" in a subsequent action. *Id.* at 79; see Pet. Br. 37 & n.15. A Section 2680 dismissal does not trigger that exception.

Our opening brief also cited (Br. 38 & n.18) cases establishing that claim preclusion attaches to jurisdictional dismissals based on state sovereign immunity. Respondent asserts (Br. 49) that state sovereign immunity "may well be an affirmative defense that does not deprive *state* courts of jurisdiction." But the States at issue in the cited cases *do* treat state sovereign immunity as "jurisdictional," even though they

also recognize that the dismissals are "on the merits" for *res judicata* purposes.[10]

b. Respondent next argues (Br. 48) that a Section 2680 dismissal does not trigger claim preclusion because "it does not reflect any judgment about the substantive tort claim under state law." But whether a Section 2680 dismissal passes on the substantive merits of a claim under *state law* is irrelevant. The FTCA is a federal statute, and although it generally subjects the United States to liability under applicable principles of state tort law, it also "specfically set[s] forth" the circumstances "where the liability of the United States is *not* co-extensive with that of a private person under state law." *Richards* v. *United States*, 369 U.S. 1, 13-14 (1962) (emphasis added). A Section 2680 dismissal adjudicates the plaintiff's substantive right under federal law—the FTCA—and it would preclude a subsequent FTCA action against the United States for that reason. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 501-502 (2001) (explaining that claim preclusion attaches to decisions "pass[ing] upon the substantive merits" of the claim).

c. Respondent ignores our independent argument that a Section 2680 dismissal has claim-preclusive effect under *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947). There, the Court granted preclusive effect to the North Carolina Supreme Court's decision that it lacked jurisdiction over a suit for a deficiency judgment arising from the sale of real estate. *Id.* at 187-188. The Court explained that claim preclusion can

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[10] See, *e.g.*, *Tinsley* v. *Washington Metro. Area Transit Auth.*, 55 A.3d 663, 667 (Md. 2012); *Texas Dep't of Transp.* v. *Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Atlantic Coast Conference* v. *University of Md.*, 751 S.E.2d 612, 617 (N.C. Ct. App. 2013).

apply to such jurisdictional dismissals when they are based "not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State," but rather "on the inaccessibility of all the courts of the State to such litigation." *Id.* at 190; see Pet. Br. 35-36. A Section 2680 dismissal satisfies the *Angel* rule because it conclusively establishes that the FTCA claim would necessarily fail in any federal court.

d. The parties agree that a Section 2680 dismissal triggers the *issue*-preclusion branch of res judicata. Resp. Br. 49; Pet. Br. 39-41. That is enough to satisfy the definition of "judgment" set forth in respondent's brief opposing certiorari (at 33), which encompassed any judgment "capable of having some preclusive effect in the first place."

Respondent now asserts (Br. 37, 49-50) that the judgment bar encompasses only judgments with *claim*-preclusive effect. But he fails to explain why that limitation makes sense. Respondent's theory that *res judicata* is relevant to the judgment bar (Br. 42-43) rests on two statements in the legislative history showing that Congress wanted to protect employees by promoting "symmetry" and extending to them the same preclusive benefit of an FTCA judgment that would otherwise accrue only to the United States. In the first statement, Assistant Attorney General Shea explained that under the judgment bar, a "[j]udgment in a tort action constitutes a bar to further action upon the same claim, *not only against the Government* (as would have been true under [*res judicata*]) *but also against the delinquent employee.*" *1942 Hearings* 27 (emphasis added). In the other, the Senate Report on

a draft of the FTCA stated that an FTCA judgment "will bar further action upon the same claim *against the negligent employees as well as against the Government.*" S. Rep. No. 1196, 77th Cong., 2d Sess. 6 (1942) (emphasis added).

At most, those statements suggest that the judgment bar promotes symmetry by granting employees the same protection that an FTCA judgment would give the United States in a subsequent FTCA suit. Under issue preclusion, a Section 2680 dismissal completely insulates the United States from any such subsequent litigation. Symmetry requires insulating the government employee in the same way.

3. Respondent also argues (Br. 51-53) that the judgment bar does not apply to judgments based on defenses personal to the government, such as those set forth in Section 2680. That argument conflicts with his prior view that the bar encompasses any judgment "capable of having some preclusive effect in the first place,"—*i.e.*, in a subsequent suit against the United States—and that its purpose is "to *expand* that [same] preclusive effect to *non-parties*." Br. in Opp. 33; see Resp. Br. 40, 42-43, 45, 50.

Respondent's personal-defense argument reflects a new understanding of "judgment" that does not turn on whether the judgment at issue would bar a subsequent action against the United States. Rather, it turns on whether an analogous judgment in favor of an employee would have barred a subsequent action against his employer based on *respondeat superior* liability; if so, then respondent counts it as a "judgment" for purposes of the judgment bar. See Resp. Br. 51-53. That very different—and far more complicated—test has no basis in the FTCA.

a. The judgment bar does not mention *res judicata*, and its use of the terms "judgment" and "bar" cannot fairly be read to incorporate respondent's new approach. The legislative history is equally unhelpful. That history reveals—at most—a desire to extend to the employee the preclusive benefits of an FTCA judgment that would otherwise accrue only to the United States. See pp. 17-18, *supra*. It does not support respondent's new position that even a judgment that *does* have preclusive effect in a subsequent suit against the United States will sometimes not trigger the judgment bar.[11]

b. Respondent's personal-defense argument also contradicts the underlying purposes of the judgment bar and Section 2680. The judgment bar's core goal is to alleviate the strain that repeat litigation over the same facts poses to government resources and morale. See Pet. Br. 23-28; *Will* v. *Hallock*, 546 U.S. 345, 353-354 (2006). Section 2680's exceptions are likewise "designed to protect certain important government functions and prerogatives from disruption," and they "mark the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Molzof* v. *United States*, 502 U.S. 301, 311 (1992) (citation and

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[11] Respondent discusses (Br. 40-43, 51-52) how various state courts would have applied *res judicata* in circumstances where a tort plaintiff first sues an employee, and only later sues the employer. But he presents no evidence that that Congress was aware of the divergent state practices with respect to that application of *res judicata*, and no evidence that Congress intended the judgment bar to cover only the exact same kinds of judgments that would be entitled to *res judicata* effect in those circumstances.

internal quotation marks omitted); see *1942 Hearings* 33.

Given those purposes, Congress would not have exempted Section 2680 judgments from the judgment bar. Its desire to avoid multiple lawsuits would have been *strongest* with respect to those claims—identified in Section 2680—as to which it refused to permit even an *initial* suit against the United States. Allowing a subsequent suit against the employee would perpetuate the same harms—including distraction to government employees and intrusive inquiries into agency documents and decision-making processes—that Section 2680 was designed to avoid.

D. Respondent's Policy Arguments Do Not Support Excluding Section 2680 Dismissals From The Judgment Bar

Respondent raises various policy arguments to support his construction of the judgment bar. Even if his concerns carried practical weight—which they do not—they would not support his conclusion that Section 2680 dismissals do not trigger the bar.

1. Respondent notes (Br. 54-55) that a broader construction of the judgment bar could incentivize plaintiffs to bring *Bivens* actions against the employee first, in order to avoid a jurisdictional dismissal under the FTCA. That is not a significant concern. Plaintiffs will almost always prefer to sue the United States under the FTCA, both because of the government's deeper pockets and because of the greater difficulty of establishing a right to relief under *Bivens*.

In rare cases where the plaintiff fears the potential applicability of Section 2680, he is free to bring both *Bivens* and FTCA actions, either jointly or sequentially. The judgment bar comes into play *only* if the

FTCA claim is litigated to a final judgment. If the plaintiff initiates the FTCA claim and then becomes aware that it is subject to one of Section 2680's exceptions, he can invoke various procedural mechanisms—including Federal Rules of Civil Procedure 15 and 41—in order to abandon the FTCA claim and avoid a final judgment. See, *e.g.*, *Manning* v. *United States*, 546 F.3d 430, 435, 438 (7th Cir. 2008) (noting that *Bivens* plaintiff can "voluntarily withdraw a contemporaneous FTCA claim"), cert. denied, 558 U.S. 1011 (2009).[12]

2. Respondent also notes (Br. 54) that enforcing the judgment bar's plain meaning could foreclose subsequent claims against the employee when the FTCA case is dismissed on purely procedural grounds, such as for improper venue. The judgment bar's application in those circumstances is not before the Court, and it is possible that some of the standard, contemporaneous definitions of "judgment" could plausibly be read to exclude such dismissals. See Pet. Br. 19-20; see also 28 U.S.C. 1406.

Scope-of-employment dismissals (Resp. Br. 54) are also not implicated here. As a practical matter, a plaintiff who is uncertain of whether the alleged tortfeasor acted within the scope of his employment can

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[12] Respondent is wrong to imply (Br. 55) that *Bivens* claims should be immune from the bar altogether. Congress expressly exempted *Bivens* claims from the FTCA's exclusive-remedy provision, 28 U.S.C. 2679(b)(2)(A), but it made no such exemption to the judgment bar. And although his amicus makes a similar argument (Professors Sisk & Pfander Br. 20-27) based on the judgment bar's phrase "by reason of the same subject matter," that argument is foreclosed by *Hui* v. *Castaneda*, 559 U.S. 799, 805-806 (2010) (construing identical language in 42 U.S.C. 233(a)). See Pet. Br. 6, 15.

insulate himself from the judgment bar by bringing his action against the employee directly. Doing so would trigger the FTCA's certification and substitution provision, 28 U.S.C. 2679(d), and the suit would either proceed under the FTCA (if the employee were deemed to have been within the scope of employment) or as an ordinary tort suit (if not).[13]

What *is* before the Court is a dismissal under Section 2680, which erects a substantive bar to relief that completely insulates the United States from any further FTCA suit. See Pet. Br. 34-35. As noted, applying the judgment bar to cases against employees arising from the same subject matter tracks the statutory text and effectuates the core purposes of both the bar and of Section 2680 itself.

To the extent respondent's policy concerns warrant any departure from the judgment bar's plain meaning, the Court should adopt the Ninth Circuit's approach from *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008). As explained in our opening brief (at 41-43), that court applies the bar to FTCA judgments that reflect Congress's decision to "flatly reject[] liability" for the claim at issue, but not to technical or procedural dismissals involving curable defects. *Id.* at 1046 (Clifton, J., concurring); see *id.* at 1042 (opinion for court). The Ninth Circuit's approach—which respondent

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[13] The judgment bar might not apply to scope-of-employment judgments at all, because its reference to "employee" might reasonably be read to exclude a person who has already been adjudicated, in the FTCA case, to have been outside the scope of employment in connection with the alleged tort. 28 U.S.C. 2676. If not, such dismissals would trigger the judgment bar even under respondent's own principal *res judicata* theory, because they would trigger claim preclusion in any subsequent FTCA action against the United States.

ignores—is faithful to the core purposes of the FTCA and far easier to apply than respondent's *res judicata* theories. It also correctly treats Section 2680 dismissals as triggering the judgment bar.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2016

No. 15-109

IN THE

Supreme Court of the United States

JERMAINE SIMMONS, ET AL.,
Petitioners,

v.

WALTER J. HIMMELREICH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in the proper construction of statutory provisions defining and limiting access to the federal courts. The resolution of such issues often has significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen attorneys have frequently represented parties or amici before this Court in cases involving significant issues of statutory interpretation and federal jurisdiction, including in *Will v. Hallock*, 546 U.S. 345 (2006), which presented the same question presented by this case.[2]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights law. Having represented many

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[1] Pursuant to Rule 37.6 of this Court, amici curiae state that this brief was not written in whole or in part by counsel for a party and that no one other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to the filing of this amicus brief are being submitted concurrently with this brief.

[2] *See, e.g., Mims v. Arrow Fin. Servs., LLC*, 565 U.S. __, 132 S. Ct. 740 (2012); *Taylor v. Sturgell*, 553 U.S. 880 (2008).

clients over the years in *Bivens* actions and Federal Tort Claims Act (FTCA) claims, the ACLU has a direct interest in the outcome of this case. In addition, the issues in this case implicate the ACLU's broader commitment to ensuring that aggrieved individuals have access to the courts.

SUMMARY OF ARGUMENT

The FTCA's judgment bar, 28 U.S.C. § 2676, extends the res judicata effect—claim preclusion—of a judgment in an FTCA action brought against the government to the federal employee whose act formed the basis for the FTCA claim. The statutory language mimics the language of res judicata, which is also a "judgment bar." Furthermore, the purpose of section 2676, its legislative history, and legal commentary soon after its passage all reflect the understanding that the FTCA's judgment bar is a res judicata provision.

Because section 2676 embodies res judicata principles, it does not bar a subsequent action where an FTCA case was dismissed because one of the exceptions to the FTCA, 28 U.S.C. § 2680, applies. Dismissal because the claim falls outside the scope of the FTCA does not resolve the merits of the underlying tort claim, and the purpose of the judgment bar is not served by applying the bar in such a case. Accordingly, whether or not the exceptions are viewed as jurisdictional, *compare* Pet. Br. 4-5, *with* Amicus Br. of Professors 10-16, the only preclusive effect of dismissal on that ground is on the issue whether the FTCA applies.

In addition, the judgment bar, by its plain language, does not apply to cases that fall within the exceptions stated in section 2680. And where an FTCA case was dismissed because section 1346(b) does not apply to the plaintiff's claims, the case cannot properly be deemed

"an action under section 1346(b)." Respondent's brief and the amicus brief of Professors Sisk and Pfander address these points, and this amicus brief therefore will not discuss them further.

ARGUMENT

I. The FTCA judgment bar extends to government employees the res judicata effect of a judgment in an FTCA case.

A. Res judicata principles

Under traditional principles of res judicata, or claim preclusion, "a final judgment on the merits of an action precludes parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Thus, after a plaintiff loses a case on the merits, his "entire claim is barred by the judgment, even as to evidence, theories, arguments, and remedies that were not advanced in the first litigation." 18 Charles Alan Wright, et al., *Federal Practice & Procedure* § 4406, at 141 (2d ed. 2002).

Historically, federal law applied res judicata principles to subsequent litigation of the same claim only when the parties to the second action were also the parties to the first action or were in privity with those parties. "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). Although this requirement has eroded over time, *see id.* at 326-28, when the FTCA was enacted in 1946, the federal courts required mutuality. *See United States*

v. Pink, 315 U.S. 203, 216 (1942); *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912); Restatement (First) of Judgments § 93 (1942) (non-party or privy to prior action "not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action"). As respondent Himmelreich has explained, in 1946, the mutuality requirement was subject to an exception allowing an employer to assert claim preclusion where its employee had prevailed in a prior suit. Resp. Br. 41 (citing Restatement (First) of Judgments § 96(2) cmt. j). The converse was not true, however—that is, exoneration of the employer in an earlier suit generally did not enable the employee to assert claim preclusion in a later suit. *Id.*

Moreover, although res judicata generally bars litigation of claims that were brought, or could have been brought, in a prior case, the doctrine does not apply when the first case was not adjudicated on the merits, as when the dismissal is for lack of subject-matter jurisdiction. *Schlesinger v. Councilman*, 420 U.S. 738, 747 (1975); 18A *Federal Practice & Procedure* § 4436, at 150 (describing "well settled" rule); *see also* Fed. R. Civ. P. 41(b) (dismissal for lack of jurisdiction not an adjudication on merits). In that circumstance, the preclusive effect of the judgment of dismissal extends to the issue of subject-matter jurisdiction, but not to other matters that were or could have been raised in the case. *Park Lake Res. Ltd. Co. v. Department of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004); Restatement (Second) of Judgments § 12 cmt. c (1982). In other words, the decision in the first case will be given collateral estoppel effect—issue preclusion—but not res judicata effect.

This understanding of the scope of preclusion underlies the Court's repeated statements that res judicata

applies where a prior case was decided "on the merits," *see, e.g.*, *Allen*, 449 U.S. at 94; *Montana v. United States*, 440 U.S. 147, 153 (1979), and is consistent with the purpose of the res judicata doctrine: "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153.

B. Res judicata and the FTCA's judgment bar

Res judicata is primarily a creation of the common law, but various federal statutes embody res judicata principles. 18 *Federal Practice & Procedure* § 4403, at 35 & n.23. The FTCA is one such statute. *Id.* at 35 n.23. As relevant here, the FTCA's judgment bar, 28 U.S.C. § 2676, provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

The language of section 2676—"judgment" and "bar"—is classic res judicata terminology. *See, e.g.*, *Parklane Hosiery Co.*, 439 U.S. at 326 n.5 ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."); *United States v. Moser*, 266 U.S. 236, 241 (1924) (where res judicata applies, "judgment upon the merits constitutes an absolute bar" to subsequent action); Restatement (First) of Judgments, Ch. 3, Introductory Note ("When it is stated that 'the rules of res judicata are applicable,' it is meant that the rules as to the effect of a judgment as a merger or as a bar ... are applicable."); *id.* § 48 (section entitled "Judgment for Defendant On The Merits—

Bar"); 18 *Federal Practice & Procedure* § 4402, at 7 (discussing "Terminology of Res Judicata"). And a judgment dismissing a case for lack of subject-matter jurisdiction, including a dismissal based on sovereign immunity, is generally not a "judgment on the merits," as petitioners agree. *See* Pet. Br. 36.

Moreover, section 2676's use of "subject matter" of the action to define the scope of preclusion echoes the common-law concept that claims arising from the same transaction are barred because they "merge" in the judgment. "Subject matter" was also used in Federal Rule of Civil Procedure 13, adopted in 1937, not long before the FTCA's enactment in 1946, to define the scope of compulsory counterclaims, which helps define the extent of claim preclusion of federal judgments.

In addition to the language of section 2676, the purpose and legislative history of the FTCA also demonstrate that section 2676 was intended to extend the res judicata effect of a judgment on the merits in an FTCA case to federal employees. As discussed above, non-mutual res judicata was generally disfavored in 1946. Consequently, when Congress enacted the FTCA, a judgment on the merits in favor of the United States in an FTCA suit would not have barred a subsequent suit by the same plaintiff against the government employee whose conduct gave rise to the FTCA claim. Absent a judgment bar, the employee might have been sued in tort after the plaintiff litigated against the United States—either because the plaintiff lost or to seek punitive damages, which are not available against the government. *See* 28 U.S.C. § 2674.

Permitting a second suit would have defeated one of the central purposes of the FTCA: "reliev[ing] employees of liability in cases in which the doctrine of

respondeat superior would apply if the United States were a private corporation." *Lauterbach v. United States*, 95 F. Supp. 479 (W.D. Wash. 1951); *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("Generally, [FTCA] cases unfold much as cases do against employers who concede *respondeat superior* liability."); *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 30 (Jan. 29, 1942) (hereinafter "Hearing") (stating that FTCA "will place the United States, in respect of torts committed by its agents, upon the same footing as a private corporate employer, with certain limitations required for the protection of important governmental functions"). Accordingly, to prevent a claimant from litigating his state-law tort suit a second time, the judgment bar releases the employee from liability upon resolution of the underlying tort claim, for "[i]t is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone." Hearing at 26, 27.[3]

Not surprisingly, in light of the purposes of the FTCA, legal commentary soon after passage of the Act construed the judgment bar in accordance with res judicata principles. One early commentator noted that the bar "applies only to judgments rendered on the merits" and cautioned that it "should not be interpreted as referring to any judgment by which the court denied

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[3] The 79th Congress, which passed the FTCA, held no hearing on the bill. This Court therefore has relied on the hearing of the 77th Congress. *Dalehite v. United States*, 346 U.S. 15, 26-27 (1953). The bulk of the hearing report consists of the testimony of Assistant Attorney General Francis Shea, who explained the Attorney General's proposed amendments to H.R. 5373, one of which was the addition of the judgment bar. Hearing at 1, 3.

its jurisdiction." Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947). This conclusion was based on the understanding that the judgment bar was a res judicata provision and that a judgment based on lack of jurisdiction "cannot be res judicata of the issues involved in the action." *Id.* at 559 & n.170; *accord* Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949).

II. Dismissal of an FTCA case that does not address the merits of the tort claim does not bar a subsequent *Bivens* claim.

The FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres v. United States*, 340 U.S. 135, 139 (1950). Reading the judgment bar to embody traditional principles of res judicata, and thus reading "judgment" in section 2676 to include only decisions on the merits of the claim, is consistent with the structure and purpose of the FTCA as a whole and avoids the inequitable consequences of broader interpretations of the term.

Like res judicata, section 2676 reflects a concern for "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Will v. Hallock*, 546 U.S. 345, 355 (2006) (quoting 18 *Federal Practice & Procedure* § 4402, at 9). Res judicata would not bar a *Bivens* action after dismissal of an FTCA suit that did not address the merits of the tort claim, such as dismissal because an section 2680 exception applied, because the employee was acting outside the scope of his employment, or for failure to exhaust—regardless of whether any of these

grounds are considered "jurisdictional" and even in a respondeat superior situation where non-mutual res judicata might today apply. So, too, section 2676 does not bar a subsequent *Bivens* action.[4]

A. Petitioners advocate a broad reading of "judgment" in section 2676, under which any final order in any case alleged (even incorrectly) to fall under the FTCA bars a subsequent action against the employee involved in the underlying act. The term "judgment," however, has many definitions, and its meaning varies with context.

For example, Federal Rule of Civil Procedure 54(a) defines "judgment" to mean "a decree and any order from which an appeal lies." Although the reading advocated by petitioners is consistent with that definition, Rule 54(a) specifies that its definition applies only "as used in these rules." Moreover, even the Rule 54 definition plainly does not include every judgment under the Federal Rules, such as a partial summary "judgment" under Rule 56 or a declaratory "judgment" in a case in which the plaintiff also seeks an injunction, the form of which has not yet been approved by the court. *See also Catlin v. United States*, 324 U.S. 229, 231, 236 (1945) (district court judgment of condemnation not immediately appealable where case not disposed of in its entirety).

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[4] The judgment bar is best read not to bar a *Bivens* action regardless of the outcome of the FTCA claim: Because a *Bivens* claim cannot be asserted against the government, it does not merge into a final FTCA judgment and thus is not barred by res judicata. Although the question whether a judgment on the merits of the FTCA claim bars a *Bivens* claim has arisen in other cases, *see, e.g.*, *Manning v. Miller*, 546 F.3d 430 (7th Cir. 2008), the answer does not affect Mr. Himmelreich's case.

In contrast, as used in Federal Rule of Civil Procedure 68, "judgment" means "either the substantive relief ordered (whether legal or equitable), or that plus attorneys' fees." *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir. 2001); *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999). Accordingly, when comparing a Rule 68 "offer of judgment" to the "judgment finally obtained" in the case, courts have noted the ambiguity of the term "judgment." *See Hennessy*, 270 F.3d at 553; *Nordby*, 199 F.3d at 392.

Federal Rule of Civil Procedure 58 requires that "[e]very judgment ... must be set out in a separate document." That separate document is commonly referred to as the "judgment." *See* Fed. R. Civ. P., Forms 70 & 71. This use of "judgment" is much narrower than the definition in Rule 54(a), which includes various collateral orders and orders with respect to injunctions, *see* 28 U.S.C. § 1292(a)(1), that do not end the litigation. *See* Rule 54(a) ("any order from which an appeal lies").

In addition, in discussing what constitutes a judgment in the context of a prior version of Rule 58, this Court equated "judgment" with a court's "final act" in a case. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-35 (1958). Under that definition, a ruling on the merits would not constitute a "judgment" if additional matters were still pending—for example, entitlement to attorney fees where the court has granted summary judgment on the merits of the cause of action. But this Court has also held that a decision that resolves all merits issues except fees is always an appealable final judgment. *See Ray Haluch Gravel Co. v. Cent. Pension Fund*, 134 S. Ct. 773 (2014). It is therefore unsurprising that, when revising Rule 58 in 2002, the Advisory Committee noted the "horridly confused problems" that

resulted from courts' varied understandings of what constitutes a "judgment" for purposes of determining whether Rule 58's separate document requirement has been satisfied. *See* Fed. R. Civ. P. 58 advisory committee's note (2002).

B. Thus, "judgment" may mean, among other things, the final decision in a case, or the substantive relief ordered, or a decision on the merits of a claim, or an appealable order, or a formal document ending a case. *See also Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (under Social Security Act, district court remand order pursuant to fourth sentence of 42 U.S.C. § 405(g) is "judgment," but remand order under sixth sentence is not). Because the meaning depends on context, one must look to the structure and purpose of the FTCA to guide construction of the term "judgment" in section 2676. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.") (citation omitted); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" consistent with the language examined in isolation, because "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Here, the context and purpose of the FTCA belie the government's reading. The purposes of the FTCA generally and the judgment bar specifically show that the term "judgment" in section 2676 means a decision on the merits. "The basic purpose of the legislation is to waive a part of the governmental immunity to suit in tort" so as to provide a remedy for people injured by the tortious conduct of government employees acting in the scope of their employment. H.R. Rep. No. 79-1287 at 1, 2 (1945). That purpose reflected recognition that the right

to sue individual employees was insufficient to provide an adequate remedy because employees often were "not financially capable of meeting a sizable judgment" and because "Government should in all conscience bear the responsibility" for those torts. Hearing at 25. The drafters were also concerned about avoiding duplicative recoveries and easing the burden on the government of defending duplicative lawsuits, given the government's practice of defending suits brought against employees for conduct within the scope of their employment. *See* Hearing at 9 ("If the Government has satisfied a claim ... that should, in our judgment, be the end of it. ... [The claimant] should not be able to turn around and sue the [government employee]."); *id.* at 24-26; *see also* Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date*, 26 N.C. L. Rev. 119, 126 (1948) ("Such a provision is, of course, in accord with the common law rule that a claimant can have but one satisfaction for one wrong. Presumably, the claimant will have been made whole by virtue of the judgment he obtained against the government and hence should have no claim against the employee.") (footnote omitted). These objectives were achieved, in part, through section 2676, by extending the res judicata effect of a judgment on an FTCA claim to the employee.

Section 2672 of the FTCA likewise requires this reading of section 2676. Section 2672 states that acceptance of an administrative settlement constitutes "a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." This language in many ways mirrors the language of the judgment bar. Furthermore, during the hearing on the bill later enacted as the FTCA, the only example provided of the operation of the judgment bar

bundled together sections 2672 and 2676, and explained that these provisions would come into play where "the claimant has *obtained satisfaction of his claim* from the Government, either by a judgment or by an administrative award." Hearing at 9 (emphasis added). The "complete release" of section 2672 applies only in instances where the claimant has accepted a settlement at th administrative stage, thereby substantively resolving the matter. The parallelism—of both language and purpose—between section 2672 and section 2676, and the unitary treatment of the two sections in the legislative history, further support reading the judgment bar to address only cases in which the judgment substantively resolves the plaintiff's tort claim.

The understanding that the judgment bar and the administrative settlement provision serve similar purposes and that the judgment bar applies only where the substantive merits of the underlying tort claim have been resolved is reflected in this Court's earliest statement with respect to the bar. In *United States v. Gilman*, 347 U.S. 507 (1954), the Court explained:

> The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 U.S.C. § 2676, it makes the *judgment against the United States* "a complete bar" to any action by the claimant against the employee. And see § 2672.

Id. at 509 (emphasis added); *see also Benbow v. Wolf*, 217 F.2d 203, 205 n.4 (9th Cir. 1954) ("The Congress has the apparent intention that the individual be not pursued if the United States be liable."). Early commentators construed the judgment bar similarly. *See* Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy*, 63 Yale L.J. 570, 575 n.30 (1954) ("palpably unfair" to construe judgment bar

to apply to all judgments, such as "where judgment is rendered for the Government on the grounds that the employee acted outside the scope of his employment"); Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167, 176 (1952) (judgment bar "obviously" does not apply where first action was dismissed because the employee had not acted within the scope of his employment); Note, 56 Yale L.J. at 559 (stating that the bar "clearly applies only to judgment rendered on the merits and should not be interpreted as referring to any judgment by which the court denies jurisdiction").

C. Notably, petitioners concede that a dismissal "distinct" from the merits of a claim, such as dismissal for subject-matter jurisdiction, generally is not a "judgment on the merits" with res judicata effect. They suggest, however, that "in [a] rare situation," that "rule" does not apply. Pet. Br. 36. Specifically, petitioners argue that a claim is precluded by a prior dismissal for lack of jurisdiction where the jurisdictional inquiry and the merits inquiry "turn on the exact same legal issue." *Id.* Petitioners declare that because a dismissal on the ground that an exception to the FTCA waiver of sovereign immunity applies means that the government "is not substantively liable for the alleged tort," that dismissal is "on the merits." Only petitioners' imprecision makes the point appear tenable. To be sure, the determination that an exception applies means that the government is not liable, but the determination does not address the *substance of the tort claim*: It does not require the court to consider duty, causation, injury, or any other aspect of the underlying claim.

Similarly, even today, although the preclusive effect of a judgment in a suit against the employer based on

respondeat superior has expanded since 1946, a court decision that an employer is not liable under a respondeat superior theory, without adjudication of the underlying claim, is not res judicata as to the employee's liability. *See, e.g.*, *Stephens v. Jessup*, 793 F.3d 941, 945 (8th Cir. 2015) (no preclusion where court cannot discern whether earlier case against employer found employee had not acted within scope of employment or found employee had not been negligent); *Gray v. Lacke*, 885 F.2d 399, 405-06 (7th Cir. 1989) (holding that claims against County employees not barred by earlier unsuccessful claim against County, where judgment for County was entered because plaintiff could not show that employees were acting pursuant to official policy and court reserved question of employees' liability); *Morgan v. City of Rawlins*, 792 F.2d 975, 980 (10th Cir. 1986) (applying Wyoming law to hold that "[i]f the only basis of the City's liability was respondeat superior, and the suit was dismissed, Mr. DeHerrera can still be subject to suit in his own capacity"); *Lober v. Moore*, 417 F.2d 714, 718 n.31 (D.C. Cir. 1969) (holding that res judicata barred claim against employee who was acting within the scope of his employment, but stating: "If it were possible that the employer's exoneration by the Virginia judgment came in consequence of a finding that the employee acted beyond the scope of his employment, the judgment would not merit conclusiveness here.").

The cases on which the government relies are not to the contrary. In *Rose v. Town of Harwich*, 778 F.2d 77 (1st Cir. 1985) (Judge Breyer), for example, the court held that, although the state court had used the term "jurisdiction" when it held that the statute of limitations had run, "Massachusetts would treat this particular limitations-based dismissal as one with claim-preclusive effect," as the first court had made a definitive

determination that the limitations period extinguished both the right and the remedy. *Id.* at 79-80. In Mr. Himmelreich's FTCA case, however, the court made no such determination, holding only that it "lack[ed] subject matter jurisdiction over acts falling within the discretionary function exception" and that the claims alleged fell within that exception. Pet. App. 49a-53a. In short, *Rose* applies the same approach as the decisions discussed above, and, under it, Mr. Himmelreich's claims are not precluded here.

Petitioners (at 34) argue that the section 2680 exceptions are substantive, and thus that a dismissal based on section 2680 has a substantive quality. But the key inquiry is not whether the exceptions have "substantive" content, but their role in the FTCA. The very first line of section 2680 makes their role clear: "The provisions of this chapter and section 1346(b) shall not apply to—." That is, the exceptions limit the scope of the government's liability for employees' torts. *See* Hearing at 28 (describing § 2680 claims as "exemptions" and "exceptions" from the bill, in contrast to torts "within the scope of the bill"). Regardless of whether the parties are correct to view exceptions as jurisdictional, *see* Pet. Br. 4-5; Resp. Br. 3, dismissal based on a section 2680 exemption (or because the government employee was not acting within the scope of his employment) does not touch on the merits question in the case: whether the employee committed a tort under the applicable state law. It is a decision with respect to whether the case falls within the class of cases for which the United States may be sued.

That a plaintiff's suit against the government failed for a reason having nothing to do with the merits of the underlying tort claim provides no reason—from either

the standpoint of traditional res judicata principles or that of the policies underlying the FTCA—to bar a claim against the employee. Just as res judicata would not bar a subsequent suit, so too section 2676 should not be stretched to do so.

III. Petitioners' reading has inequitable and irrational outcomes.

Giving the judgment bar a common-sense reading that accords with principles of res judicata serves the goals of the statute and avoids unjust results. Petitioners' reading, however, would transform the judgment bar from a tool for fairness and efficiency into a punitive provision to trap unsophisticated plaintiffs or those who—at the start of litigation, before discovery—have a good faith (but incorrect) belief that a federal employee was acting within the scope of employment or that a claim does not fall within an exception to the waiver of sovereign immunity. *Cf. Dolan v. U.S. Postal Serv.*, 546, 481, 491 (2006) (rejecting government's "unduly generous interpretation" of FTCA exception that would "run the risk of defeating the central purpose of the statute").

Lacking a crystal ball, many plaintiffs with viable claims cannot avoid the "Kafka-esque" results of the government's position. *Manning v. Miller*, 546 F.3d 430, 438 (7th Cir. 2008) (quoting *McCabe v. Macaulay*, 2008 WL 2980013, at *14 (N.D. Iowa 2008)). Although some courts have suggested that plaintiffs could protect themselves by bringing both a *Bivens* claim and an FTCA claim in the same suit, the government would block that avenue as well. For example, at the government's urging, the Seventh Circuit in *Manning* held that a later FTCA judgment bars entry of judgment on an *earlier Bivens* verdict in the same case.

Manning had been erroneously convicted of kidnapping and murder, based in part upon material evidence fabricated by agents. *Id.* at 432. Heeding the Seventh Circuit's advice that "plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions," *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996), Manning after he was cleared brought the two claims together in one complaint. The claims were tried together, the *Bivens* claim to a jury and the FTCA claim to the judge. The jury found in favor of the plaintiff on his *Bivens* claim and awarded $6.5 million in damages. Before the district court had ruled on the FTCA claims, Manning moved for entry of judgment on the jury's *Bivens* verdict, noting concern that a subsequent judgment on his FTCA claim might nullify the *Bivens* judgment. A year later, without having ruled on the motion for entry of judgment, the district court found for the United States on the FTCA claims. Citing the judgment bar, the defendants then moved to vacate the jury verdict on the *Bivens* claim. The district court granted the motion. *See* 546 F.3d at 434.

Affirming the district court's order, the Seventh Circuit in *Manning* suggested that the plaintiff was to blame for losing his favorable *Bivens* judgment because he did not dismiss the FTCA claim after obtaining the *Bivens* verdict. 546 F.3d at 438. But at that stage of the case, a plaintiff cannot unilaterally dismiss. *See* Fed. R. Civ. P. 41(a). Moreover, in the government's view, even a voluntary dismissal of an FTCA claim triggers the judgment bar. *See Palma v. Dent*, 2007 WL 2023517, at *1, *5 (N.D. Cal. July 12, 2007) (rejecting government's argument that a *Bivens* claim was barred by a contemporaneously filed FTCA claim that was voluntar-

ily dismissed without prejudice). Under the government's reading, any resolution of an FTCA claim, once filed, bars other claims, whether filed before or after, and regardless of the reason why the FTCA claim was dismissed. *See, e.g., Estate of Trentadue v. United States*, 397 F.3d 840, 859 (10th Cir. 2005) ("[T]he fact that the district court entered judgment on the *Bivens* claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676.").

The government's invocation of the judgment bar in Westfall Act cases further illustrates the irrational results of the government's position. Under the Westfall Act, the government can transform certain claims—but not *Bivens* claims—into FTCA claims by certifying that the wrongful act that forms the basis for the suit was committed by an "employee of the Government while acting within the scope if his office or employment." 28 U.S.C. § 2679(b)(1). The government has used the Westfall Act certification in combination with section 2676 as a basis for dismissal of *Bivens* claims in ways that neither reflect nor further the purposes of the FTCA and the Westfall Act.

In *Freeze v. United States*, 343 F. Supp. 2d 477, 481 (M.D.N.C. 2004), for example, after the government's Westfall Act substitution, the government attorney moved to dismiss the resulting FTCA claim for failure to exhaust and the *Bivens* claim on the basis of the judgment bar. The court dismissed both claims. In another case, *Maxwell v. Dodd*, 2009 WL 3805597 (E.D. Mich. 2009), the plaintiffs sued government employees in connection with an unlawful search, alleging both Fourth Amendment violations and state tort claims. When the government substituted in and converted the claims into FTCA claims, the case was dismissed without prejudice

for failure to exhaust the FTCA administrative remedy. Rather than exhausting, the plaintiffs amended their complaint to allege only *Bivens* claims against the individuals. *Id.* at *1-*2. The individuals, represented by the U.S. Attorney's Office, then moved to dismiss that complaint on the basis of the judgment bar. *Id.* at *3 (quoting defendants as asserting "'[t]he judgment bar applies in this case simply because plaintiff alleged state law claims against [] federal employee(s) acting within the scope of their federal employment'"). In other words, although the plaintiffs neither filed nor pursued an FTCA suit, the government's position was that the judgment bar blocked the plaintiffs from any remedy at all. There, the court rejected the argument, *id.* at *4, but the government's position there follows from its position before this Court.

The Court should not sanction the government's plea to transform the FTCA into a trap for the unwary.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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February 2016

No. 15-109

In The

Supreme Court of the United States

JERMAINE SIMMONS & BRIAN BUTTS,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PROFESSORS GREGORY SISK AND JAMES PFANDER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

Gregory Sisk and James Pfander submit this brief as amici curiae.[1] Our only interest in this matter is that of legal scholars on federal courts, jurisdiction, and procedure; constitutional and statutory claims against the Federal Government and its officers; and statutory waivers of federal sovereign immunity.

Professor Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). For more than a quarter of a century, his scholarly work has focused on civil litigation with the Federal Government. He has published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed. 2006 & Supp. 2012); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & Update 2015). A new treatise on *Litigation With the Federal Government*, including a chapter devoted primarily to the Federal Tort Claims Act, is scheduled for publication in early 2016 as part of the West Academic hornbook series. Sisk also has

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than the amici curiae and their employers, the University of St. Thomas and Northwestern University, which provide professional development funds to faculty members to support scholarly and public service work.

written a series of law review articles on federal statutes waiving sovereign immunity.

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SUMMARY OF THE ARGUMENT

Several federal courts have employed a Federal Tort Claims Act (FTCA) judgment which failed to address the substantive tort liability of the United States to preclude an injured plaintiff from seeking an alternative remedy against an individual federal officer on a distinct constitutional theory. By reading the FTCA judgment bar to apply to subsequent constitutional claims, these courts have offered a

breathtakingly dynamic interpretation of 28 U.S.C. § 2676 that is divorced from its specific text, original meaning, historical context, and purpose. A modest and narrowly targeted legislative supplement to the law of non-mutual collateral estoppel (issue preclusion) applying in tort cases has been converted into a super-charged, all-embracing, and novel rule of non-mutual res judicata (claim preclusion).

To make matters worse, when addressing the scope of the FTCA judgment bar, many Courts of Appeals have stumbled into a misguided exploration about whether rejection of an FTCA suit by reason of a statutory exception should be characterized as a jurisdictional dismissal rather than a judgment on the merits. Those courts correctly recognizing that the FTCA exceptions are non-jurisdictional substantive defenses have continued down the erroneous path by mistakenly reading a disposition on exception grounds to trigger the FTCA judgment bar.

When the FTCA was enacted in 1946, Section 2676 was designed to block a specific kind of duplicative litigation that could result from the Government's acceptance of *respondeat superior* liability in suits for ordinary negligence. Under the law of the period that prevailed in some states and as stated in the *Restatement (First) of Judgments* § 96 (1942), if a plaintiff filed a tort suit against an employee and the employee was exonerated of negligence liability, the doctrine of non-mutual issue preclusion likewise barred suit against the vicariously liable employer. But the opposite was not true under the *Restatement*,

that is, a judgment exculpating the derivatively-liable employer from liability for negligence did not bar a subsequent tort claim against the employee. The FTCA judgment bar ensured that a judgment on the merits of a negligence claim would operate as a preclusion bar in both directions.

Section 2676 was enacted with suits against the drivers of Government vehicles most prominently in mind: it would, for example, block negligence suits against the driver of a federal postal truck whose act or omission had given rise to an earlier tort suit against the Federal Government that had concluded with a judgment of non-negligence. The idea was straightforward: once a plaintiff pursued a vicarious liability tort claim against the Federal Government to judgment on the factual merits in an action that fell under the FTCA, the judgment bar blocked a later suit against the federal employee for the same act or omission when also based on "the same subject matter," that is, when grounded in the same theory of state law negligence. *See* 28 U.S.C. § 2676.

By its text, understood in light of its original legal context and animating purpose, Section 2676 cannot be stretched to suppress a broader range of claims than those made actionable under the FTCA. In paricular, the judgment bar cannot preempt constitutional claims brought under the authority of *Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Such *Bivens* claims seek to impose liability on federal officers or employees in their personal capacity. The Government itself

bears no liability for *Bivens* claims, that is, the United States has no vicarious or *respondeat superior* liability for the constitutional torts of its employees.

Moreover, when a putative FTCA action is excluded by reason of one of the statutory exceptions stated in 28 U.S.C. § 2680, the judgment bar in Section 2676 is expressly retracted. Section 2680 directs that when an exception applies, then "[t]he provisions of this chapter and section 1346(b) of this title shall not apply." Accordingly, when an exception defeats an FTCA action, Section 2676 is never triggered and does not preclude a subsequent lawsuit against a different party.

ARGUMENT

I. Rather Than Faithfully Applying the Text and Original Meaning of 28 U.S.C. § 2676, the Courts of Appeals Have Entangled the Application of the Judgment Bar With a Misguided Jurisdictional Inquiry

When a person injured at the hands of a federal employee is unable to maintain a putative state tort action against the United States because the claim by its nature falls outside the purview of the Federal Tort Claims Act (FTCA), the judgment bar as codified in 28 U.S.C. § 2676 never comes into operation. As addressed in Part II of this brief, this judgment bar was meant to preclude a plaintiff who failed to establish negligence in an FTCA action against the United

States from taking a second bite at the same tort apple (the "same subject matter") by thereafter suing the individual employee.

When a claimant's state-law tort case against the United States as an entity falls away on an exception to the FTCA, the Courts of Appeals have divided on whether a subsequent *Bivens* claim against the individual employee is precluded by the statutory judgment bar. Rather than faithfully attending to the specific text and original meaning of Section 2676, many lower federal courts have reached disparate results by addressing the separate question of whether the dismissal of the FTCA action on exception grounds should be characterized as a jurisdictional or non-jurisdictional disposition. That misguided debate has prompted a further digression into the meaning of the word "judgment" for preclusion purposes.

A. The Courts of Appeals Have Mistakenly Understood the Application of the FTCA Judgment Bar as Turning on Characterization of a Judgment as Jurisdictional or Not

Appreciating that the exceptions to the FTCA stated in 28 U.S.C. § 2680 are substantive limitations on the Government's liability, the United States Court of Appeals for the Seventh Circuit has long and rightly refused the Government's importuning to treat these exceptions as non-waivable jurisdictional preconditions. *See Stewart v. United States*, 199 F.2d

517, 519 (7th Cir. 1952). To accept the Government's suggestion that an FTCA exception is jurisdictional "would mean that even if the government failed to raise any of these defenses, the district court and this court (and the Supreme Court, if the case went that far) would be obliged to consider it." *Collins v. United States*, 564 F.3d 833, 837 (7th Cir. 2009). Instead, the FTCA exceptions "limit the breadth of the Government's waiver of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction from the federal courts." *Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008).

Having avoided the error of carving the FTCA exceptions into jurisdictional stone, the Seventh Circuit nonetheless has gone astray by misapprehending the judgment bar in Section 2676 as triggered whenever a judgment is on the merits, but regardless of the subject matter of the ruling or the nature of the subsequent lawsuit. Thus, the Seventh Circuit mistakenly extrapolates an FTCA dismissal on exception grounds into preclusion of a *Bivens* constitutional tort claim against an individual federal officer arising from the same events (but not the same tort theory). *See Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010). Indeed, the Seventh Circuit takes an exceptionally broad (and wrongheaded) view of the FTCA judgment bar: any FTCA judgment will bar the claimant's *Bivens* action, no matter that the FTCA judgment turned on statutory defenses peculiar to the Government that do not bear the slightest relevance to the viability of the constitutional tort claim. *See*

Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180, 184-85 (7th Cir. 1996).

Other Courts of Appeals have sensibly sought to narrow the sweep of the FTCA judgment bar to prevent manifest unfairness. In the case under review, for example, the United States Court of Appeals for the Sixth Circuit appropriately observed that it would be "punitive" to bar a plaintiff from seeking an alternative remedy in a subsequent action because he had mistakenly filed an earlier FTCA action, "when that statute does not permit recovery." *Himmelreich v. Federal Bureau of Prisons*, 766 F.3d 576, 580 (6th Cir. 2014).

Unfortunately, to reach this correct outcome, these courts have held that the judgment bar does not apply to FTCA suits dismissed on jurisdictional grounds, which these same courts mistakenly regard as including dismissals based on the FTCA exceptions found in Section 2680. *See, e.g.*, *Himmelreich*, 766 F.3d at 578-80; *Hallock v. Bonner*, 387 F.3d 147, 154-55 (2d Cir. 2004), *vacated on other grounds sub nom. Will v. Hallock*, 546 U.S. 345 (2006). In so doing, these courts have imposed a jurisdictional gloss on to the FTCA exceptions that is not supported by the text of the statute or consistent with this Court's FTCA decisions. *See infra* Part I.B.

By extending a jurisdictional mischaracterization of substantive defenses to limit the reach of the judgment bar, these courts have perpetuated confusion

about the nature of the FTCA exceptions.[2] The answer for which these courts have been searching is to be found forthrightly in the text and animating purpose of Section 2676 and its express direction that a prior FTCA judgment precludes a subsequent suit only when that judgment was based on the "same subject matter," that is, the same tort theory. *See infra* Part II. The question thus turns on the legal terms of art found in Section 2676 itself, not on side disputes about the jurisdictional character of other provisions or about the meaning of "judgment."

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[2] The Ninth Circuit has deepened the confusion by treating an FTCA exception as a curious hybrid between a jurisdictional prerequisite and an affirmative defense. Under *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992), the plaintiff has the initial burden of demonstrating jurisdiction, which will fail if the claim on the face of the complaint appears to come within one of the FTCA exceptions. If the plaintiff's complaint does not clearly trigger an exception, the Ninth Circuit shifts the burden to the United States to actually prove the applicability of the exception, saying it is "analogous to an affirmative defense." *Id.* at 702. In contrast with a typical affirmative defense, however, the Ninth Circuit permits the United States to raise an exception at a late stage, once again elevating the exception to a jurisdictional command not subject to waiver. *Richardson v. United States*, 943 F.2d 1107, 1112-13 (9th Cir. 1991).

B. The Exceptions to the FTCA in Section 2680 Are Substantive Defenses, Not Jurisdictional Prerequisites

Because they are stated in the FTCA as substantive exceptions to liability, rather than as limits on the grant of subject matter jurisdiction to the courts, the numerous exceptions should not be treated as jurisdictional.[3] *See generally* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 552-58 (2008); Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 Temple L. Rev. 91 (2015).

The FTCA was enacted in part as a conferral of jurisdiction on the District Courts, with a textual delineation of the factors that define court jurisdiction. In *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994), this Court directly outlined the genuinely jurisdictional elements of the Federal Tort Claims Act (which notably do not include the exceptions in 28 U.S.C. § 2680). Examining 28 U.S.C. § 1346(b), which speaks in the language of jurisdiction, the *Meyer* Court explained that it "grants the federal district courts jurisdiction over a certain

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[3] Under exceptional circumstances, such FTCA exceptions as the discretionary function exception, 28 U.S.C. § 2680(a), and the military combat exception, *id.* § 2680(j), may have jurisdictional or justiciability implications under the political question doctrine.

category of claims for which the United States has waived its sovereign immunity and 'render[ed],' itself liable." *Meyer*, 510 U.S. at 477 (citations omitted).

The jurisdictional parameters of the FTCA thus include that "category" of claims which "allege the six elements" outlined in 28 U.S.C. § 1346(b)(1), namely a claim (1) against the United States, (2) for money damages, (3) for personal injury, death, property harm, or property loss, (4) caused by the negligent or wrongful act or omission of any employee of the United States, (5) while acting within the scope of his office or employment, (6) under circumstances where a private person would be liable under the law of the place where the act or omission occurred. *Meyer*, 510 U.S. at 477.

By contrast, those additional provisions of the FTCA that "prescribe the test of allowable claims" and articulate exceptions to such liability fall within the court's jurisdiction to grant or deny a claim on its merits, but are not jurisdictional rules in and of themselves. *See Feres v. United States*, 340 U.S. 135, 140-41 (1950).

An all-consuming jurisdictional-style imperative for each element of the FTCA's waiver of federal sovereign immunity would have "drastic" consequences because "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections may be resurrected at any point in the litigation," and courts are obligated to consider jurisdictional requirements *sua sponte*. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012)

(non-FTCA case). The federal courts would be obliged to identify and thoroughly explore each item on an exhaustive (and exhausting) list of every statutory exception, procedural requirement, and time limitation that could conceivably be invoked as a defense to an FTCA claim. As David Currie lamented about the duty of the courts to "investigat[e] the existence of jurisdiction on their own and at any stage of the proceedings," this is an "expensive habit." David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. Chi. L. Rev. 268, 298 (1969).

Moreover, when a statutory provision is mistakenly characterized as jurisdictional in nature, the determination of which issues deserve to be litigated (or which instead may be waived or forfeited) is taken out of the hands of the parties (both the claimant and the Government). *See* Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 10 (2008) ("Waiver, consent, and forfeiture allow the parties to designate which issues require court decision and which are of such relative unimportance to the parties that they would rather forgo the costs of litigating them.").

Mindful of the drastic effects of a jurisdictional reading, the earliest Court of Appeals decision to address the character of the exceptions concluded that the FTCA "confer[s] general jurisdiction of the subject matter of claims within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven." *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952). The suggestion that a plaintiff must anticipate

and negate every FTCA exception as a jurisdictional precondition was thought "preposterous." *Id.* at 520.

In an occasional stray passage, this Court sometimes described an FTCA exception as "preclud[ing] the exercise of jurisdiction," *Smith v. United States*, 507 U.S. 197, 199 (1993), or offered a footnote sketch of an earlier exception ruling as preventing "jurisdiction to try a tort action," *Dalehite v. United States*, 346 U.S. 15, 31 n.25 (1953). These casual comments fell far short of a holding that the exceptions partake of subject matter jurisdiction. Never has the Court suggested the exceptions were jurisdictional in the distinct sense of being non-waivable prerequisites requiring *sua sponte* consideration by the courts. Indeed, in both *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 68 (1955) (which described the FTCA exceptions as "substantive limitations"), and *Block v. Neal*, 460 U.S. 289, 294 (1983), the Court noted that the Government had conceded that the discretionary function exception was not implicated – a concession the Court did not question as it would have been obliged to do *sua sponte* were the exception a jurisdictional element.

In recent decades, no decision by this Court has hinted at jurisdictional consequence for an FTCA exception.[4] Indeed, decisions since the turn of the

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[4] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710 (2004), the Court did say that foreign substantive law might apply in FTCA cases "if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign

(Continued on following page)

century have strongly indicated otherwise. For example, in *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Court observed that the waiver of sovereign immunity for the FTCA comes in two sections of the code. The first expressly "confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment," and the second directs that the United States is liable in the same manner as a private person under like circumstances but not for prejudgment interest or punitive damages. *Id.* at 484-85 (citing 28 U.S.C. §§ 1346(b)(1), 2674). By contrast, the "qualifi[cation of the FTCA] waiver of sovereign immunity for certain categories of claims" through thirteen exceptions is found in a separate part of the statute. *See id.* at 485; *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

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harm" that had been planned or supervised inside the borders of the United States. This then was another reason to read the foreign country exception, 28 U.S.C. § 2680(k), as barring claims involving injury in another nation. However, in this part of the opinion, the Court was speaking of "jurisdiction" primarily in terms of the geographic location of the court, whether in one or another state or country, with choice of law consequences, rather than in terms of federal judicial authority to hear a particular class of claims. In any event, the Court did not suggest that the FTCA exception was a non-waivable jurisdictional prerequisite.

Moreover, the *Dolan* Court emphasized that the nature of the statutory provision at issue affects the manner in which it should be construed. The Court "noted that this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Dolan*, 546 U.S. at 491 (citation omitted). The Court explained that "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 491-92 (citations omitted). This Court thereby rejected the Government's plea for strict construction of the exceptions in its favor as conditions on the waiver of sovereign immunity. *See id.* at 491. *See generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1268-71 (2014).

Most recently, in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), this Court expressly rejected the Government's assertion that the statute of limitations for the FTCA is jurisdictional. The Court characterized the propensity to "attach[ ] jurisdictional consequence to conditions on waivers of sovereign immunity" as belonging to an "earlier era." *Id.* at 1637. Today, the Court sets a "high bar" for reading a particular provision to impose jurisdictional limitations, given the "harsh consequences" of preventing

any waiver of the issue and imposing a duty on the courts to evaluate the matter *sua sponte*. *Id.* at 1632.

The *Kwai Fun Wong* Court highlighted that the FTCA statute of limitations, 28 U.S.C. § 2401(b), is set out in a different section of the statute than the jurisdictional grant. *Kwai Fun Wong*, 135 S. Ct. at 1633. Likewise, the exceptions to the FTCA are found in Section 2680, not in the grant of jurisdiction over FTCA claims in Subsection 1346(b)(1).

* * *

The question in this case is not, as too many of the Courts of Appeals have seen it, whether a prior FTCA disposition was on jurisdictional grounds, nor whether a jurisdictional dismissal qualifies as a "judgment." Rather, restoring attention to the text, context, and historical origins of Section 2676, the crucial inquiry is whether the FTCA judgment disposed of the same state tort theory that the plaintiff seeks to resurrect in the subsequent action. Preclusion follows under Section 2676 when the prior judgment was "by reason of the same subject matter," which is a term of art borrowed from the *Restatement (First) of Judgments* to indicate resolution on the identical legal theory. The textually specific and historically correct interpretation would deny the judgment bar *any* role in the preclusion of *Bivens* claims. In the next part of this brief, we turn to that dispositive analysis.

II. Under Section 2676, Exoneration of the Vicariously-Liable Government Employer for Non-Negligence in an FTCA Suit Bars a Subsequent Claim Only as to the Same Tort Theory Against the Individual Employee

Under Section 2676 of the Federal Tort Claims Act, "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." When enacted in 1946, Federal Tort Claims Act of 1946, chap. 753, 60 Stat. 844, the judgment bar was designed to complement and supplement the common law of preclusion to prevent the plaintiff from getting two bites at the apple on the merits of a single tort claim, regardless of whether the plaintiff went to judgment first against the Government as the employing entity or first against the individual Government employee.

A. Congress Enacted Section 2676 to Supplement Limited Preclusion Law and Direct That a Non-Negligence Finding for the Derivatively-Liable Federal Employer Bars a Claim on the Same State Tort Theory Against the Employee

Under the law of preclusion when the FTCA was enacted in 1946, if an injured plaintiff first sued the servant (the employee) on a theory of negligence and lost with a finding of non-negligence, the

exoneration would block a second suit against the master (employer). *Restatement (First) of Judgments* § 96 (1942). As a narrow exception to the strict rule of mutuality that prevailed at the time, *see id.* § 93, a judgment in favor of the directly-liable employee was accorded preclusive effect in a later action against the vicariously-liable employer. The *Restatement* justified this departure from mutuality by pointing to the duty of indemnity, *id.* § 96(1)(a), that is, the servant's duty to indemnify the master for any vicarious liability imposed on the master on account of the servant's negligence, *Restatement (First) of Restitution* § 96 (1937).

But when the order of litigation was reversed, the rule of non-mutual preclusion did *not* apply, at least in some states and under the 1942 *Restatement of Judgments*. An exoneration of the master in an earlier action had no effect in a subsequent claim against the servant; it "binds neither the plaintiff nor the [servant]." *Restatement* § 96(2). The *Restatement* could discern "no reason for an exception to the ordinary rules of mutuality," because the servant, as the party primarily liable, was owed no duty of indemnity and faced no threat of unfairness through inconsistent results. *Id.* § 96(2) cmt. j.

In sum, the employer would enjoy preclusion from exoneration of the employee in a prior judgment because the employer's liability was derivative or secondary under the doctrine of *respondeat superior*. But some state courts and the *Restatement* refused to treat a judgment in an action against the master as a bar to further litigation against the servant, even

where the issue of negligence had been resolved against the plaintiff in the earlier suit. *See generally* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 419-20, 429-39 (2011).

As Congress during the 1930s and 1940s considered legislation waiving sovereign immunity and imposing *respondeat superior* liability on the United States for tort claims, the Government expressed concern that the *Restatement*'s rules of preclusion would not regard a prior non-negligence finding in an action against the United States as barring renewal of the same negligence claim against the employee. Assistant Attorney General Francis M. Shea testified at the leading hearing on the legislation in support of a legislative-fix to this problem:

> If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

Tort Claims: H.R. 5373 and H.R. 6463 Hearings Before the Comm. on the Judiciary, 77th Cong. 9 (1942) (hereinafter "Hearings") (statement of Francis M. Shea, Assistant Att'y Gen., U.S. Dept. of Justice).

To avoid that uneven result, Congress enacted Section 2676 into the FTCA to block negligence suits against the driver of a federal postal truck whose act or omission had given rise to an earlier judgment in a negligence suit against the United States. The drafters of Section 2676 borrowed the "same subject matter" reference from the *Restatement* where it had been used to describe a narrow subset of claims that rested on the same theory of liability. *See Restatement (First) of Judgments* §§ 70, 84 (1942). The "same subject matter" formulation captured the logic underlying the judgment bar's relaxation of mutuality. Thus, a judgment for the Government through a finding of non-negligence – that is, on the "same subject matter" – fairly bars a negligence claim against the employee arising from the same act or omission because the prior judgment negates the identical theory of tort liability.

By establishing non-mutual preclusion in both directions for both federal employer and federal employee when the underlying negligence issue had been decided in a suit against either, Section 2676 of the FTCA operates to furnish a symmetry that had eluded the *Restatement*. In this way, the judgment bar served to block a specific kind of duplicative litigation that otherwise could have resulted from the Government's acceptance of *respondeat superior*

liability in suits for ordinary negligence. *See generally* Pfander & Aggarwal, *supra*, 8 U. St. Thomas L.J. at 420-21, 439-49.

B. By Barring a Subsequent Claim "By Reason of the Same Subject Matter," Section 2676 Precludes Only the Same State Tort Claim Against the Employee That Had Been Adjudicated in a Prior FTCA Claim Against the United States in *Respondeat Superior* Litigation

Tearing Section 2676 loose from its animating purpose when enacted by Congress and re-interpreting the text in a manner divorced from its meaning and legal context, some Courts of Appeals have driven this symmetrical *respondeat superior* preclusion provision into the nonparallel and non-*respondeat superior* context of constitutional tort claims. Instead of the term of art, "same subject matter," that had been used in the 1940s to limit the reach of the judgment bar to the same legal claim on which the Government had waived its immunity in the FTCA, these courts have improperly substituted the modern preclusion language of "same transaction or occurrence" to reach all claims that arose from the same set of events. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 n.22 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes . . . ."); *Restatement (Second) of Judgments* § 24(1) (1980) ("[T]he claim extinguished includes all rights . . . with respect to all

or any part of the transaction, or series of connected transactions, out of which the action arose.").

Under this novel and textually untethered reading of the statute, when a case proceeds to judgment on a common-law tort theory under the FTCA, the judgment bars the plaintiff from maintaining a factually related constitutional tort claim against an individual federal officer under *Bivens*. *See, e.g.*, *Manning v. United States*, 546 F.3d 430, 432-37 (7th Cir. 2008); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858-59 (10th Cir. 2005). But this typically unexamined extension of Section 2676 to factually related claims asserted in the *Bivens* context cannot be squared with the text, history, and simple logic of the FTCA.

First, by its plain language, Section 2676 applies only when the subsequent action against the employee is brought "by reason of the same subject matter" as was the prior judgment in the action against the United States under the FTCA. When evaluating whether two lawsuits have been brought "by reason of the same subject matter," the courts should interpret the language Congress adopted not by reference to modern ideas of supplemental jurisdiction or transactional relationship but according to the meaning of those terms at the time of their enactment. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 704-08 (2004) (determining congressional understanding of the FTCA exception for a claim "arising in" a foreign country by looking to the "sense of 'arising in' [that] was the common usage in state borrowing statutes

contemporary with the Act" and by considering the "object" of the provision in light of principles of substantive law when the FTCA was enacted).

Importantly, Section 2676 does not enact a free-standing preclusion provision, but rather forms an integral part of the Federal *Tort* Claims Act. In general, the FTCA imposes liability on the Federal Government according to principles of state tort law. Thus, the most logical conclusion from the statutory context is that phrase "same subject matter" in the statute takes its meaning from the state tort law that is the central theme and field of operation for the FTCA as a whole. *See Dalehite*, 346 U.S. at 28 ("Uppermost in the collective mind of Congress were the ordinary common-law torts.").

As discussed in Part II.A, when the FTCA and its judgment bar became law in 1946, non-mutual preclusion doctrine treated an unsuccessful suit for negligence against the *employee* as a bar to a subsequent action against the employer on the same theory of negligence. *See Restatement (First) of Judgments* § 96 (1942). But this rule of non-mutual issue preclusion did not apply when the first suit was brought against the *employer*. *Id.* The FTCA's judgment bar corrects this asymmetric result by enabling the Government employee to raise the prior Government judgment as a bar to a second negligence suit, despite the absence of mutuality.

While the statute supplemented the common law of non-mutual preclusion to achieve a measure of

symmetry, the judgment bar applied only when the judgment on the FTCA claim and the claim against the employee were based on the same theory of tort liability. Factual overlap between the two claims did not alone trigger the application of the bar. Thus, where the Government's liability, based on the doctrine of *respondeat superior*, was derivative of that of the employee, exoneration of the Government (through a finding, say, of non-negligence) was tantamount to exoneration of the employee. In that narrow situation, a judgment in the suit against the Government would negate the liability of the employee and appropriately bar further litigation.

Where the Government succeeded on the basis of a defense personal to the Government, however, the judgment bar did not apply and the suit could proceed against the employee. *See Restatement (First) of Judgments* § 99 (1942) (a "valid *judgment* on the merits and not based on a personal defense *bars* a subsequent action" in circumstances of vicarious liability) (emphasis added). Thus, judgments for the Government based upon a finding that an employee was acting outside the scope of employment (thereby rendering the *respondeat superior* liability of the Government inapplicable) were certainly "judgments" within the meaning of the FTCA. But those judgments did not foreclose an action against the employee because they did not negate the employee's liability. *See, e.g.*, *Government Emp. Ins. Co. v. Ziarno*, 170 F. Supp. 197, 200 (N.D.N.Y. 1959), *rev'd on other grounds*, 273

F.2d 64 (2d Cir. 1960); *see generally* Pfander & Aggarwal, *supra*, 108 U. St. Thomas L.J. at 439-48.

Viewed in light of then-existing rules of preclusion, Congress chose the "same subject matter" as a term of art to limit the judgment bar's application to cases where tort issues arose in the vicarious liability context and thus shared an essential identity. *See Molzoff v. United States*, 502 U.S. 301, 307 (1992) (looking to the legal understanding during the FTCA enactment period to define a legal term of art incorporated into the statute). For Section 2676, Congress borrowed the "same subject matter" phrase directly from the 1942 *Restatement*, where it described claims in which both the relevant facts and the theory of liability were identical. *See Restatement (First) of Judgments* §§ 70, 84 (1942).

For example, *Restatement* § 70 provides that legal determinations made in litigation between the parties are not conclusive "in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction." In explaining the construct, comment b defines the same subject matter quite narrowly to apply to successive breach of contract claims on a single contract, or successive suits for installments of interest under a single contract or rental payments due under a single lease. *Id.* § 70 cmt. b. At the time, these were regarded as different "causes of action" because they arose from separate breaches of duty, but they were nonetheless subject to preclusion

because the legal question at the heart of the two claims was otherwise identical.

The requisite identity exists under the FTCA only where the Government has accepted *respondeat superior* liability and the basis on which the Government's liability was adjudicated bears on the viability of the underlying claim against the employee. Claims to which Section 2676 applies – again, claims arising from "the same subject matter" – are claims based on common-law theories of tort liability to which the FTCA's acceptance of *respondeat superior* liability extends. *See* Hearings, *supra*, at 26-27 ("It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone."). For that reason, Section 2676 has logical effect only when the asserted liability of the employer is indeed vicarious. But the Federal Government is not liable in *respondeat superior* for a *Bivens* claim. *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994). That legal nullification of vicarious liability interrupts the corresponding operation of the FTCA's judgment bar.

Applying the "same subject matter" test that Congress incorporated into the FTCA, a constitutional tort claim under *Bivens* simply does not arise from the same source of state common law or follow the same theoretical trajectory as that under the FTCA. Thus, where a court rejects an FTCA claim on grounds that shed no light at all on the viability of a factually related *Bivens* claim, neither the statute's text nor its logic call for application of the judgment bar.

Consider the Seventh Circuit's mistaken decision in *Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010). There, the finding that slander claims were not cognizable as intentional torts under the FTCA did not logically bar a wholly distinct constitutional tort claim under *Bivens* for racial discrimination; the claims were not brought "by reason of the same subject matter." But the Seventh Circuit nonetheless found that the judgment bar was applicable, denying the plaintiff a day in court on the race discrimination claim. The court's mistaken decision grew out of its failure to recognize that the constitutional tort claim did not arise from "the same subject matter" as a common-law tort claim within the scope of the FTCA.

C. Federal Courts Can Effectively Coordinate FTCA and *Bivens* Claims Without the Blunt Instrument of the Judgment Bar

By holding that the FTCA judgment bar does not apply to *Bivens* litigation, this Court would reaffirm a proper and properly limited interpretation of the language Congress enacted. But in doing so, the Court need not abandon the goal of securing the coordinated resolution of parallel claims under the FTCA and *Bivens*, a goal that doubtless animates some lower court interpretations of the judgment bar.

Section 2676 offers a solution to only one very modest problem of preclusion law: the problem of asymmetric non-mutual issue preclusion in the context

of *respondeat superior* litigation. But this statutory judgment bar does not otherwise supersede the continued application of evolving common-law rules of claim and issue preclusion.

Indeed, Section 2676 was drafted on the assumption that those rules would continue to apply. Section 2676 was intended to fill a specific gap in the law of non-mutual collateral estoppel at the time, not to displace the general law of preclusion. In particular, the FTCA judgment bar does not state that a prior judgment against the employee with a finding of non-negligence would preclude a subsequent suit against the employer. That was not necessary to say in the statute, as the 1940s-era law of preclusion already so provided. Common-law preclusion rules of that period would bar an action to impose vicarious liability on the Government after a judgment exonerating the primarily-liable employee whose act or omission gave rise to the claim.

Nor does Section 2676 foreclose the use of the single satisfaction rule as a limit on the ability of a plaintiff to pursue separate awards against both the Government and its employees. *See Brooks v. United States*, 337 U.S. 49, 54 (1949); *Restatement (Second) of Judgments* § 51 (1982); *cf.* 28 U.S.C. § 2672 (settlement with the Government under the FTCA also releases claims brought against employees by reason of the same subject matter).

Lower courts have successfully applied these nuanced coordination tools to litigation under 42

U.S.C. § 1983 and can do so here once the Government's expansive account of the judgment bar has been rejected. *See generally* Pfander & Aggarwal, *supra*, 108 U. St. Thomas L.J. at 465-70.

Early decisions under the FTCA adopted precisely these forms of coordination both to ensure that the plaintiff did not recover more than a single satisfaction and to protect the plaintiff's right to trial by jury. *See, e.g.*, *Moon v. Price*, 213 F.2d 794, 796-97 (5th Cir. 1954) (plaintiff may pursue claims against both the employee and the Government but may secure only a single satisfaction; trial court drew upon jury trial findings in assessing the Government's liability under the FTCA). Such coordination would protect plaintiffs from astonishingly broad conceptions of the preclusive effect of the judgment bar. *See Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008) (retroactively invalidating a *Bivens* jury verdict on the basis of the trial court's subsequent rejection of an FTCA claim).

III. Because Section 2680 Directs That the Provisions of the FTCA "Shall Not Apply" When a Case Falls Within an Exception to the FTCA, Section 2676's Judgment Bar Is Then Retracted

For tort allegations that are precluded by the statutory exceptions, the plain language of 28 U.S.C. § 2680 further confirms the inapplicability of the judgment bar to such dismissals. Section 2680 sets

out the various exceptions to the FTCA and is prefaced with the directive that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to" the excluded types of claims. 28 U.S.C. § 2680.

This introductory text to the FTCA exceptions directly negates the judgment bar. By retracting the "provisions of this chapter" – which of course includes Section 2676 – Section 2680 states unequivocally that the judgment bar has no function when an exception is applied. *See Levin v. United States*, 133 S. Ct. 1224, 1232 (2013) (holding that the phrase "shall not apply" in the Gonzalez Act, 10 U.S.C. § 1089(e), states "in no uncertain terms" that the intentional tort exception to the FTCA does not apply to claims involving medical personnel employed by certain agencies).

The Government's primary response (Pet. Br. at 48-50) is to bypass the FTCA as enacted in 1946 and invoke a self-sufficient provision enacted four decades later in 1988. Under the direct terms of the Federal Employees Liability Reform and Tort Compensation Act (Westfall Act), a remedy against the Federal Government as an entity is broadly made "exclusive of any other civil action or proceeding for money damages" when a personal injury claim arises from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," 28 U.S.C. § 2679(b)(1), with an express exception for a *Bivens* constitutional action against an employee, *id.* § 2679(d)(2).

After the United States has taken the place of the employee as defendant, the matter "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) and shall be subject to the limitations and exceptions applicable to those actions." *Id.* § 2679(d)(4). Thus, by the terms of the Westfall Act itself, the action against the substituted United States goes forward as a matter of course under the FTCA, subject to its exceptions. *United States v. Smith*, 499 U.S. 160, 161-62 (1991).

The independent operation of the Westfall Act of 1988 according to its own terms and purpose sheds no light on the parameters of the FTCA judgment bar of 1946 nor expands its modest preclusive effect.

CONCLUSION

The judgment bar, 28 U.S.C. § 2676, was designed to achieve the modest goal of ensuring the availability of non-mutual issue preclusion in favor of Government employees after the Government had been exonerated with a finding against negligence in a proper Federal Tort Claims Act suit. Section 2676 was framed at a fairly high level of specificity to foreclose not all subsequent litigation against employees, but only such subsequent claims that (1) were brought against the employee by reason of the "same subject matter," that is, the same state law tort theory, and (2) that had been resolved on the factual merits in favor of the United States in a prior suit

that came inside the scope and outside the exceptions of the FTCA.

Under Section 2676, the prior dismissal of the respondent's putative FTCA action does not preclude the respondent's subsequent *Bivens* action. The FTCA action was neither one concluded by a judgment "by reason of the same subject matter" nor one to which the FTCA would apply. Accordingly, the ruling of the Sixth Circuit should be affirmed.

Respectfully submitted,

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